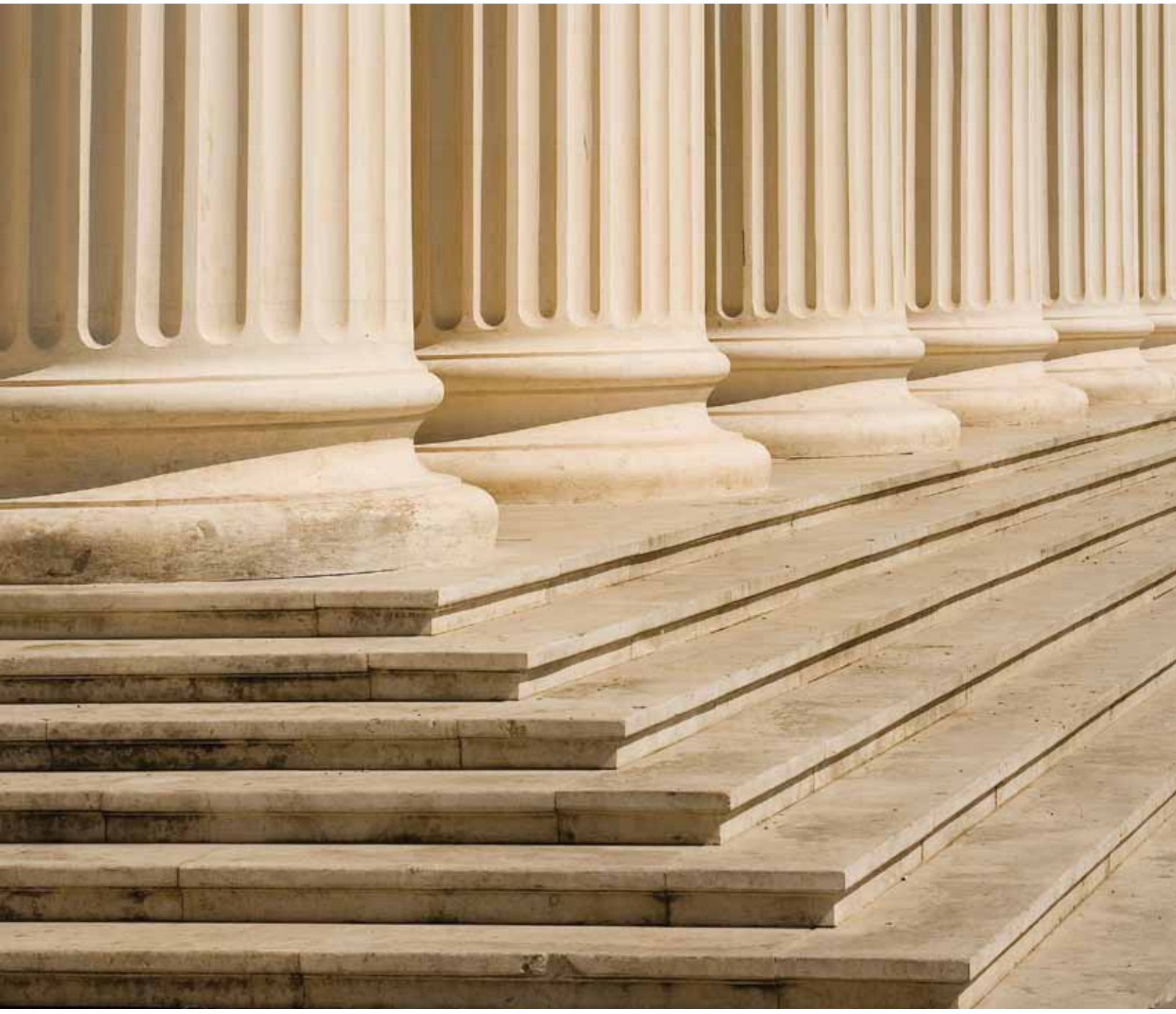
2011 VOLUME 38, NO. 2

The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS



FOUNDATIONAL LEADERSHIP
THE NEXT STEPS

2011 VOLUME 38, NO. 2

The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

MILITARY JUSTICE

TEAMING

TRAINING

LEGAL ASSISTANCE

FIELDS OF PRACTICE

BOOKS IN BRIEF

The Reporter

2011
Volume 38, Number 2

The Reporter is published quarterly by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/ AFJAGS (150 Chennault Circle, Maxwell AFB, AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

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Message from

The Commandant

This edition of *The Reporter* is an amazing compendium of exceptionally useful articles that center on the four pillars of Foundational Leadership—Teaming, Training, Military Justice, and Legal Assistance. You will find a number of "how-to" articles for wing level judge advocates, paralegals, and civilian employees. We also include outstanding articles that are more strategic in nature. Thanks to our many contributors for the hard work and effort they put into their submissions!

We start off with an extensive coverage of military justice issues in this edition of *The Reporter*. Colonel Kenneth M. Theurer and Mr. James W. Russell, III share their thoughts on the important role Staff Judge Advocates have in advising commanders on the use of pretrial agreements. Lieutenant Colonel Teri Saunders writes about the positive trend in courts-martial processing times. Also, one of our newer paralegals, Airman First Class Alec Knoles (also known as "The Article 15 Master"), writes an open letter to military justice teams throughout the JAG Corps on what he sees are the benefits of serving nonjudicial punishment actions within 10 days of discovery of the offense.

Next, we start off the teaming pillar with an article by Chief Master Sergeant John P. Vassallo on "The Meaning of Teaming." He describes the teaming concept as "more than just a new policy, program or directive, but as a culture change that we need to embrace." This article is a "must read" for all JAG Corps members.

Chief Vassallo's article on teaming is followed by a joint submission from Captain Brian Whipple and Technical Sergeant Vilmarys Crossen. They provide a very useful step-by-step description of how teaming has enhanced will preparation at Yokota Air Base, Japan.

From the The Judge Advocate General's Action Group (TAG), Colonel Sharon Shaffer and Mr. John Martinez also highlight the importance of training. Colonel Shaffer's article details her thoughts on developing leaders in today's JAG Corps by focusing on a respect for diversity. Mr. Martinez's article discusses the emerging JAG Corps Requirements Based Training System—an initiative to develop, track, and improve JAG Corps training.

Mr. Jeff Middleton focuses on legal assistance with his introduction to the JAG Corps of the newly formed Community Legal Services Division (AFLOA/JACA). Major Scott Hodges, who assumed duties as the Deputy Chief of the division this summer, explains in his article why 2011 has been the year of the Servicemembers Civil Relief Act.

We hope this edition of *The Reporter*, with its diverse selection of articles, educates and entertains you, and most importantly, assists you in your ability to serve our great country.

PRETRIAL AGREEMENTS

The Hidden Cost

by Colonel Kenneth M. Theurer, USAF and Mr. James W. Russell III

Few topics, other than metrics, generate more animated, and often heated, discussions among staff judge advocates than the appropriate use of pretrial agreements. However animated, this discussion is healthy because it focuses our collective attention on the whys, whens, and hows of a tool, that if improperly understood or inappropriately used, actually detracts from good order and discipline. SJAs and Convening Authorities shouldn't simply be swayed by the siren song of speedy, risk-free resolution; instead, PTAs should be weighed rationally, carefully and even warily.

A little history and background is useful in setting the stage for a productive discussion. Readers may be surprised that the present policy and use of pretrial agreements contrasts with long-standing Air Force policy and practice. Air Force policy has evolved from outright prohibition, to strong discouragement, to largely unfettered use by convening authorities subject only to the exhortation to use caution before entering pretrial agreements. Current policy recognizes that there are circumstances warranting resolution of criminal allegations via a pretrial agreement. Lost in the policy changes have been attempts to articulate the costs to military justice when we shortcut the time-tested system of resolving findings

of guilt and appropriate sentences through a fully developed trial by courts-martial.

Pretrial agreements bring certainty to the criminal process. In that regard, they benefit both sides as the defense and the Government know exactly what the findings will be and what the maximum sentence will be. Pretrial agreements can reduce both direct and indirect costs. Here, the Government may avoid the direct costs of having to subpoena or travel witnesses and employ experts for both sides. Other saved costs can include the time costs of military witnesses, military judges, military counsel, legal office personnel, and perhaps court members. Without doubt these represent "cost savings"—but at what price? What if the certainty of the result is so attractive to the accused that he pleads to a lesser offense in a case that the Government would have dropped for fear of being unable to prove the charges? What if the Government overcharges the case or refers the case to a general court-martial to provide an incentive to plead to a lesser offense in a special court-martial?

The use of pretrial agreements, similar to the use of plea bargaining in civilian criminal jurisdictions, has significant downsides including: the lack of transparency, the inherently coercive nature of the bargaining process, and the tendency of negotiated pleas to distort the public record regarding the true facts and circumstances surrounding criminal misconduct, just to name a few In sharp contrast to civilian criminal justice, where systems of justice depend on plea bargaining to clear overburdened dockets, the Air Force has sufficient resources to fully litigate every court-martial. The marginal gains in celerity offered by pretrial agreements are belied by the fact that the lion's share of our discovery to convening authority action (D2A) timeline occurs prior to referral of charges. Even more, an inordinate number of our pretrial agreements are entered into in the eleventh hour, when a trial date for a litigated court-martial has already been established and significant costs associated with trying the case have already been expended.

The Manual for Courts-Martial provides little guidance on the appropriate use of pretrial agreements. Rule for Courts-Martial (R.C.M.) 705 provides that "[S]ubject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule." The rule goes on to discuss the nature of the agreement, permissible terms and conditions, and procedure. Neither the rule, nor the discussion provided within the rule, provide any insight as to when a pretrial agreement is appropriate. Air Force Instructions (AFIs) and Policy Directives (AFPDs) provide some overarching guidance, but little in the way of specificity.[1] What follows traces the evolution of both the policy governing, and the frequency of use of pretrial agreements in Air Force courts-martial practice. Next, we examine the often hidden costs associated with pretrial agreements. Finally, we describe situations where these costs are outweighed by the benefits to the Government and the accused.

Use of Pretrial Agreements in Air Force Courts-martial Practice

Unlike civilian criminal jurisdictions within the United States, where plea bargaining accounts for 95% of all convictions,[2] approximately 40% of convictions in Air Force courts-martial result from pretrial agreements. Even the use of pretrial agreements in 40% of courts-martial is in strong contrast to Air Force practice during our first thirty years of existence as a separate service. Figure 1 depicts the use of pretrial agreements in Air Force courts since tracking this data in the Automated Military Justice Analysis and Management System (AMJAMS) began in 1981.

See Figure 1: Pretrial Agreements as a percentage of courts-martial cases (1981-2010)

Prior to 1975, the use of negotiated pleas to obtain a conviction in trial by court-martial was prohibited.[3] In 1975, Air Force Manual (AFM) 111-1 was changed to permit the use of pretrial agreements but "only in exceptional cases are the undesirable aspects of this practice outweighed by the advantage

[1] *See e.g.*, AFI 51-201, Administration of Military Justice, para. 8.4 (21 Dec. 2007); AFPD, 51-2, Administration of Military Justice, para. 8 (7 Sept. 1993) ("Pretrial agreements will be limited to cases in which the available evidence of guilt is convincing, conviction is probable, and a sound, convincing reason to forego trial of the facts and issues exists.")

[2] Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 No. 5 Criminal Law Bulletin 4, 4 (Fall 2010). Foreign criminal jurisdictions rely even less on the use of plea bargaining to obtain convictions. In Italy, only 8% of convictions are obtained via plea bargains. In Germany, 20-30% of convictions result from plea bargains. *Id*.

[3] AFMAN 111-1 (2 July 73), para. 4-8 ("In accordance with the firmly established policy of the Air Force, the use of negotiated pleas is prohibited".)

***Figure 1*: Pretrial Agreements as a percentage of courts-martial cases (1981-2010)**

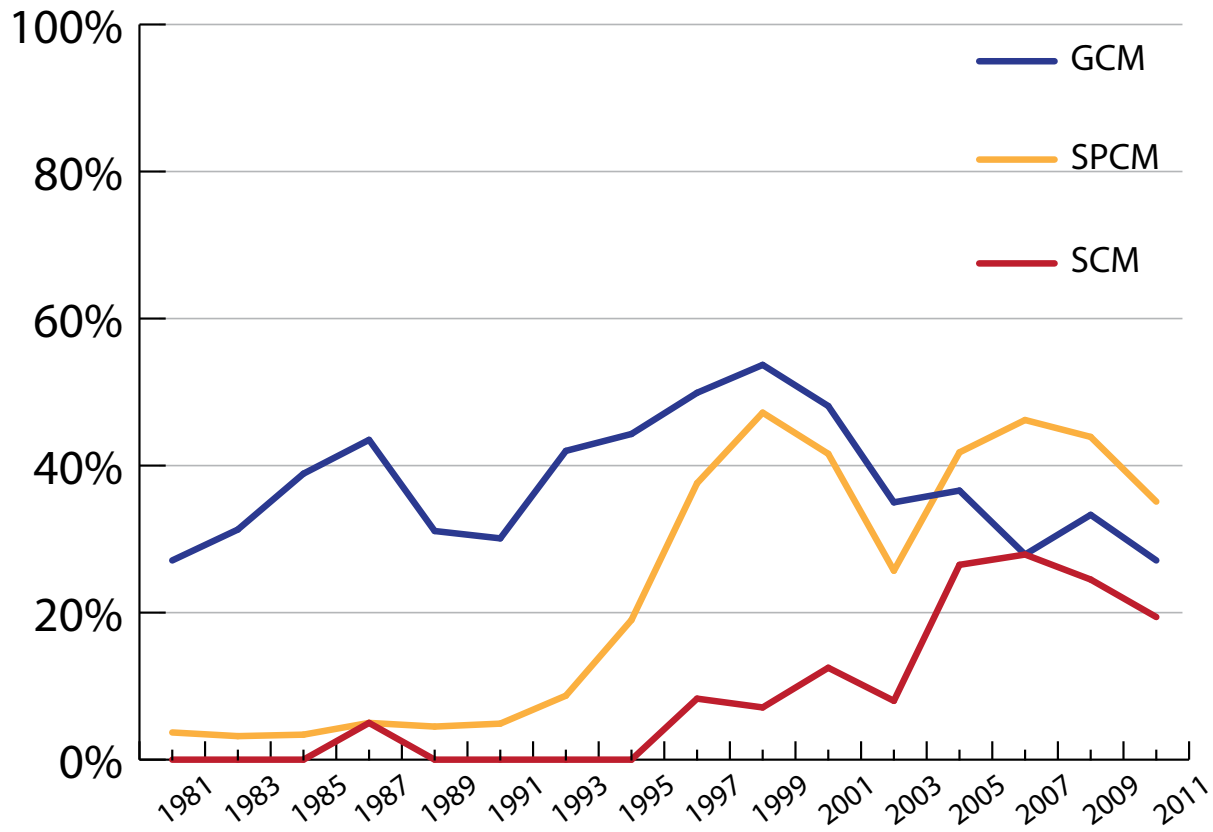


***Figure 2*: Use of Pretrial Agreements (1975 to Present)**

Period	Policy	GCM	SPCM	SCM
Prior to 1975	Prohibited	0%	0%	0%
1975-1978	Exceptional cases	N/A*	N/A*	N/A*
1979-1986	Discouraged	37%	4%	<1%
1987-1995	Use caution	36%	9%	0%
1996-present	Use caution	39%	40%	20%

to the Government and the accused."[4] Convening Authorities were only permitted to enter pretrial agreement discussions with specific permission from The Judge Advocate General or his designee.

Beginning in 1979, the rules regarding the use of pretrial agreements were relaxed to some degree. While the stated policy was to discourage the use of pretrial agreements, the guidance recognized that "in certain exceptional cases the undesirable aspects of this practice may be outweighed by the advantages to both the Government and the accused."[5] Further, the approval authority was relegated to the general courts-martial convening authority. In addition, special courts-martial convening authorities could enter into pretrial agreements with permission from the general courts-martial convening authority.

By 1987, the official Air Force policy no longer affirmatively discouraged the use of pretrial agreements, though it continued to make plain the undesirable aspects of the practice. The policy stated: "caution is advised whenever a pretrial plea agreement is being considered. There are many undesirable aspects associated with the use of a pretrial agreement in a criminal trial; not the least of which is the impression often created by such an agreement that the interests of justice are being compromised. In certain cases, however, the advantage to both the Government and the accused may clearly outweigh the unattractive features of a pretrial agreement."[6]

In 1996, the policy was amended, and the approval level was further relaxed. While caution remained the watchword, the evil to be avoided migrated from the notion that pretrial agreements contained an inherent risk of shortchanging the justice process to concerns regarding expediency. Practitioners were reminded to "use caution whenever a pretrial agreement (PTA) is being considered. A PTA is appropriate when there are benefits to the Government and the accused. PTAs should not be entered into by the Government solely for expediency, i.e. to dispose of a case quickly with minimal consideration for the consequences of the agreement." Further, special courts-martial convening authorities became fully empowered to enter pretrial agreements—"unless withheld by a superior authority, GCMCAs and SPCMCAs are authorized to enter into or reject offers to enter into PTAs with the accused. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the CA that referred the case to trial."[7]

Not surprisingly, the use of pretrial agreements has increased as the policy towards their use has softened and as approval levels have been lowered. As detailed in Figure 2, since 1981 when data was first recorded, Air Force policy has delegated authority to enter pretrial agreements to general courts-martial convening authorities. Since that time, use of pretrial agreements in general courts-martial has been relatively constant in 36-39% of cases, although the use of pretrial agreements in general courts-martial spiked at close to 54% in 1997.

See Figure 2: Use of Pretrial Agreements (1975 to Present)

More remarkable is the spike in the use of pretrial agreements in both special and summary courts-martial since 1996. Prior to that date, special courts-martial convening authorities could only enter into pretrial agreements with approval from the general courts-martial convening authority. Pretrial agreements accounted for less than 10% of special courts-martial and were virtually non-existent in summary courts-martial. Since that time, the use of pretrial agreements in special courts-martial now exceeds the use in general courts-martial. More startling is the use of pretrial agreements in summary courts-martial, a forum that already contains significant jurisdictional limits on available punishments.

While the historic use and policy regarding pretrial agreements is instructive, it sheds little light on the issue of when the use of pretrial agreements is appropriate. Every Air Force practitioner of military justice can recite that costs and expediency alone, do not justify pretrial agreements. Further, most understand that justification for a pretrial agreement requires articulating the benefits to both the Government and the accused of the deal. Less certain, is how many practitioners can articulate the costs—those

[4] AFM 111-1 (C1), para. 4-8, stated that "PTAs were discouraged and should only be used in exceptional cases" (25 Aug. 1975).

[5] AFM 111-1 (IMC 79-4), para. 4-8.

[6] AFR 111-1 (1 Oct. 87), para. 7-1 .

[7] AFI 51-201(1996), para. 6.7

"undesirable aspects" and "unattractive features"—to the justice system of pretrial agreements.

Good Deal for the Trial Counsel, Good Deal for the Defense— Bad Deal for Justice

While anecdotal evidence is often poor precedent for change in policy, bad examples are instructive for the lessons they provide. Recent cases have involved convictions and sentences achieved through pretrial agreements where the negotiated sentence has been less than one half of the adjudged sentence. Some bases have referred cases to more serious forums (general or special courts-martial) in order to force the defense into offering a plea to a reduced forum pursuant to a pretrial agreement. In another category of cases, the Government has dismissed the most serious charges, including the ones that drive the decision to refer the case to trial, in return for a conviction on less serious charges. Some cases have involved accepting pleas to alternative charges in order to avoid congressionally mandated collateral consequences including sex offender registration. Finally, some cases have involved entering into stipulations of fact that vastly understated the facts and circumstances that would have been available to the court members or military judge in a fully developed proceeding. The parties in each of these reduced the transparency of the military justice system, distorted the public record, shortchanged the interests of victims and command, and, in some cases, created a coercive bargaining process.

Pretrial agreements remove the adjudication of guilt and appropriate sentence from the fully transparent public forum of trial by courts-martial. Rather than the military judge or members fully assessing guilt and adjudging the appropriate punishment, the outcome is in large part determined though informal negotiations between lawyers. This tends to deprive our commander-centric system of justice from operating in its intended commander-centric manner. The interests of the respective lawyers as agents may or may not perfectly mesh with either the interests of the accused, command, the affected community and the larger perception of justice. As one commentator reflecting on the civilian plea bargaining system observed:

> [T]he prevalence of plea bargaining has drastically reduced the number of trials and robbed citizens of opportunities for direct participation in criminal justice. Plea bargaining inhibits transparency, insuring that criminal justice is run behind closed doors by insiders (judges, prosecutors, defense attorneys, and law enforcement officials) to the exclusion of outsiders (ordinary citizens and victims) who are left ill informed about criminal justice. As a result, some of the most basic purposes of juries are lost: criminal law is deprived of the legitimacy that is served when ordinary citizens are directly involved in its implementation, and the valuable jury process of debating, enforcing, and preserving societal norms rarely happens.[8]

The military justice system, a commander-based system, suffers likewise when judge advocates are substituted for panels of officer and enlisted members as the focal point for resolving criminal cases. Military justice becomes more a "JAG problem" and less an instrument for maintaining the high community standards necessary for maintaining good order and discipline.

Closely related to the issue of transparency, is the issue of agency costs associated with negotiated pleas. The system is markedly less transparent when the interests of agents to a negotiated plea are not perfectly meshed with the parties they represent. If trial and defense counsel were perfect agents for the Government and the accused respectively, the agency costs associated with pretrial agreements would be *de minimis*. As stated in Air Force Standards for Criminal Justice, "[t]he duty of the prosecutor is to seek justice, not merely to convict."[9] Likewise, "the basic duty the defense counsel owes to the administration of justice is to serve as the accused's counselor and advocate with courage and devotion, to the utmost of his or her learning and ability, and

[8] Kevin K. Washburn, *Restoring the Grand Jury*, 76 Fordham L. Rev. 2333, 2347 (2008).

[9] Air Force Standards for Criminal Justice, Standard 3-1.1, TJAG Standards Policy Memorandums, TJS-03 Atch 1 (15 Oct. 2002) [hereinafter Standard].

according to law."[10] However, both trial and defense counsel are subject to both real and perceived outside factors that influence their negotiating positions in arriving at a pretrial agreement. To the extent that these outside factors create a tension with the Air Force Standards for Criminal Justice, they impose an agency cost on negotiated plea agreements and detract from the legitimacy of the military justice system.

Staff judge advocates, and their subordinate trial counsel, are influenced by factors similar to their civilian prosecutor counterparts.

> But the assistant's immediate goal is not necessarily to find the optimal strategy for controlling crime or even for reelecting his superior. Rather, his goal (in an economic model) is to maximize his own welfare, which is defined by some combination of career advancement, job satisfaction, and leisure. Pursuing an optimal crime control strategy may help advance the prosecutor's career, but other factors are likely to do so more effectively. The front-line prosecutor may gain by trying a case that the public interest would require to be settled. Conversely, the front-line prosecutor will often have powerful personal and professional reasons to avoid trying cases that would be inconvenient or potentially risky for his career.[11]

Expediency, non-military justice workload, costs, risk-aversion, and lack of confidence are all factors that make pretrial agreements attractive to staff judge advocates and their trial counsel. When these factors detract from the primary goal of achieving justice, both in reality and community perception, the cost to the military justice system of entering pretrial agreements rises.

Military defense counsel are also influenced by external factors, but not to the extent of either the staff judge advocate and their trial counsel, or their civilian defense counsel counterparts.[12] Military defense counsel are insulated from fiscal considerations faced by both the Government and civilian defense counsel counterparts. With their work portfolio limited to defending Airmen, military defense counsel have fewer outside demands on their time. Neither the system, nor the accused in most cases, pushes defense counsel for an expedient resolution. Military defense counsel, in most cases, are more experienced and confident than their trial counsel counterparts. Despite these seeming advantages, defense counsel can be seen as bargaining from a position of disadvantage. The Government controls the charges, the forum, and the investigative function. In this context, pretrial agreements tend to be coercive—or as some legal scholars have noted, there is "the innocence problem."[13].

Despite these safeguards, there remains the possibility that the "innocent" accused may feel compelled to accept a pretrial agreement to lesser charges, a reduced forum, or a reduced sentence cap.

Charging a person with a crime has been described as the "ultimate expression of the State's coercive power."[14] The danger associated with this coercive power is that an accused may agree to enter a guilty plea in a situation where the Government is not prepared to prove guilt beyond a reasonable doubt. Unlike most civilian criminal systems, the military justice system has features that reduce the risk of an innocent accused agreeing to a finding of guilt via a negotiated plea. For example, the military judge conducts an exhaustive inquiry pursuant to *United States v. Care,*[15] that ensures that the accused com-

[10] *Id*. Standard 4-1.1

[11] Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992).

[12] Smith, *supra*, note 2.

[13] Schulhofer, *supra* note 11 at 1981.

[14] Nirej Sekhon, *Willing Suspects And Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 Harv. C.R.-C.L. L. Rev. 103, 144 (2011).

[15] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

prehends the effect of a plea of guilt, and that there is a solid factual basis on which to believe the accused is in fact guilty. In addition, the lack of mandatory minimum sentences reduces leverage in the sense that the Government cannot guarantee a minimum sentence. In fact, a recent study suggests that at least within the Air Force, the accused, on average, does not receive any real benefit in terms of adjudged sentence in return for a plea of guilty.[16] In essence, the only benefit to the accused is the certainty generated by the sentence limitation provided by the pretrial agreement.

Despite these safeguards, there remains the possibility that the "innocent" accused may feel compelled to accept a pretrial agreement to lesser charges, a reduced forum, or a reduced sentence cap. A particularly noxious course of action is when the Government refers charges to an inappropriately severe forum in order to bargain with the defense for a plea of guilty in exchange for referral to the more appropriate lesser forum. Doing so crosses the line because the prosecutor is in a "very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[17]

In addition to issues with transparency, agency costs, and coercion, pretrial agreements have a tendency to distort the "public record." The record may not reflect the true nature or even the reason the misconduct initially warranted trial by courts-martial when the Government agrees to reduced charges or sanitized "stipulations of fact." In some cases, the Government may forego a trial on the most serious charges in return for a plea to relatively minor offense. In other cases, the defense may agree to plead to a violation of Article 128—Assault[18] in lieu of Article 120—Rape, Sexual Assault, and Other Sexual Misconduct,[19] in order to avoid mandatory sex offender registration that would result from a conviction. Often, the defense agrees to a very basic stipulation of fact that contains few of the aggravating factors that initially prompted resolution of the case by courts-martial. A Trial Counsel armed with a pretrial agreement has less incentive to produce the witnesses that would fully develop the facts and circumstances and allow the military judge or members to make a fully informed decision regarding an appropriate sentence. In all of these examples, the message communicated to victims of crime, the accused, members, the military community, and the public at large is neither accurate nor flattering to the system of military justice.

Very importantly, these distortions can have a particularly negative impact on the victim's perception of the military justice system. Take a case where an underage victim has alleged and is willing to testify to being forced to commit sodomy upon the accused. The accused agrees that sodomy occurred, but asserts it was consensual and offers to plead to consensual sodomy in return for a sentence cap. The Government elects to accept the pretrial agreement recognizing that the victim's credibility may be subject to impeachment. Both sides enter into a stipulation of fact that supports the plea. While there is certainty in the outcome, the underage victim is forced to sit silently in courtroom while her behavior is stipulated to be consensual, the accused makes an unsworn statement describing the event consistent with his plea, and the government agrees through the stipulation of fact that the accused's representations are true. Even the most outstanding VWAP counselor is sorely challenged under these circumstances.

Despite these significant drawbacks to the use of pretrial agreement, there are times when a pretrial agreement absolutely benefits both the Government and the accused—and those benefits outweigh these "undesirable aspects" and "unattractive features" of the practice.

Pretrial Agreements with Articulable Benefits to the Government and the Accused

Based on the discussion above, one could conclude that the negative aspects associated with pretrial agreements outweigh the benefits and, therefore, the use of negotiated pleas should be prohibited.

[16] Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Air Force Courts-martial*, 8 Journal of Empirical Legal Studies 1, 206-35, (2011).

[17] Berger v. U.S., 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

[18] 10 U.S.C. § 928.

[19] 10 U.S.C. § 920.

The Manual for Courts-Martial leaves discretion in this matter to the secretaries of the services—so such a prohibition is clearly possible. For nearly thirty years, the Air Force policy was exactly that, and pretrial agreements were prohibited outright. Nonetheless, over the years, policy makers recognized that there were circumstances where negotiated pleas were warranted.

While this list is not exhaustive, Air Force regulations and instructions have described five situations where the use of a pretrial agreement may be advisable. First, if the victim of crime is so traumatized experts advise the Government that participation in the trial process will cause the victim further trauma.[20] Second, are similar situations where the disclosure of sensational information involving innocent persons can be avoided through a negotiated plea.[21] These situations should be relatively rare, and the fact that crime may be embarrassing to a unit, or the Air Force, should not be a consideration. Third, are cases where several accused are involved, and the testimony of one is required in the trial of one or more of the others. In this case, a plea agreement may be more desirable than a grant of immunity.[22] Fourth, are situations where essential witnesses are located at exceptional distances, are not amenable to process or are not otherwise available.[23] Current operations, in some circumstances, may make critical witnesses unavailable. Finally, there are cases involving national security where the harm to the Government of a fully litigated trial needs to be avoided.[24] In these cases, pretrial agreements can help avoid exposure of evidence that contains classified or sensitive information.

There are certainly other situations where a pretrial agreement may be in the best interest of both the Government and the accused. Noticeably absent from that list of appropriate considerations are several common justifications. First, is the practice of entering a pretrial agreement for expediency, i.e. to dispose of a case quickly with minimal consideration for the consequences of the agreement. Second, is the closely related practice of entering a pretrial agreement to avoid the costs associated with fully developing the facts necessary to adjudge the guilt or innocence of the accused. Third, is the practice of agreeing to a pretrial agreement to avoid congressionally mandated collateral consequences such as DNA collection, sex offender registration, or the Lautenberg Amendment. Fourth, is the practice of referring a case to a more severe and inappropriate forum in order to coerce the accused into entering a pretrial agreement. Finally, is the practice of overemphasizing litigation risk in order to justify a pretrial agreement.

Cost, expediency, collateral consequences, and litigation risk are all factors the staff judge advocate and the convening authority need to consider in determining whether a pretrial agreement is warranted. However, these factors are present in nearly all cases and individually they are not ordinarily factors that outweigh the detrimental aspects of pretrial agreements. Current Air Force policy requires the staff judge advocate to be able to articulate the benefits to the Government and the accused of entering into a pretrial agreement. But if the staff judge advocate is not aware of and considering the potential costs to the military justice system of entering a pretrial agreement, then any perceived benefit will make a pretrial agreement seem attractive. Instead, the true system costs of a PTA must be consciously considered and balanced against the actual benefits in order to achieve just results.

Staff judge advocates have an obligation to preserve this extraordinary legal system which exists "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment and thereby to strengthen the national security of the United States."[25] Comprehending and fairly considering the "undesirable aspects" of pretrial agreements will ensure we maintain the rule of law in a fair, timely and transparent manner.

[20] AFM 111-1(C1), para. 4.8(c)(3)(25 Aug. 1975).

[21] AFR 111-1(C4), para. 7-1(a)(8 Nov. 1991).

[22] AFM 111-1(C1), para. 4.8(c)(2)(25 Aug. 1975).

[23] AFM 111-1(C1), para. 4.8(c)(1)(25 Aug. 1975).

[24] AFR 111-1(C4), para. 7-1(a)(8 Nov. 1991).

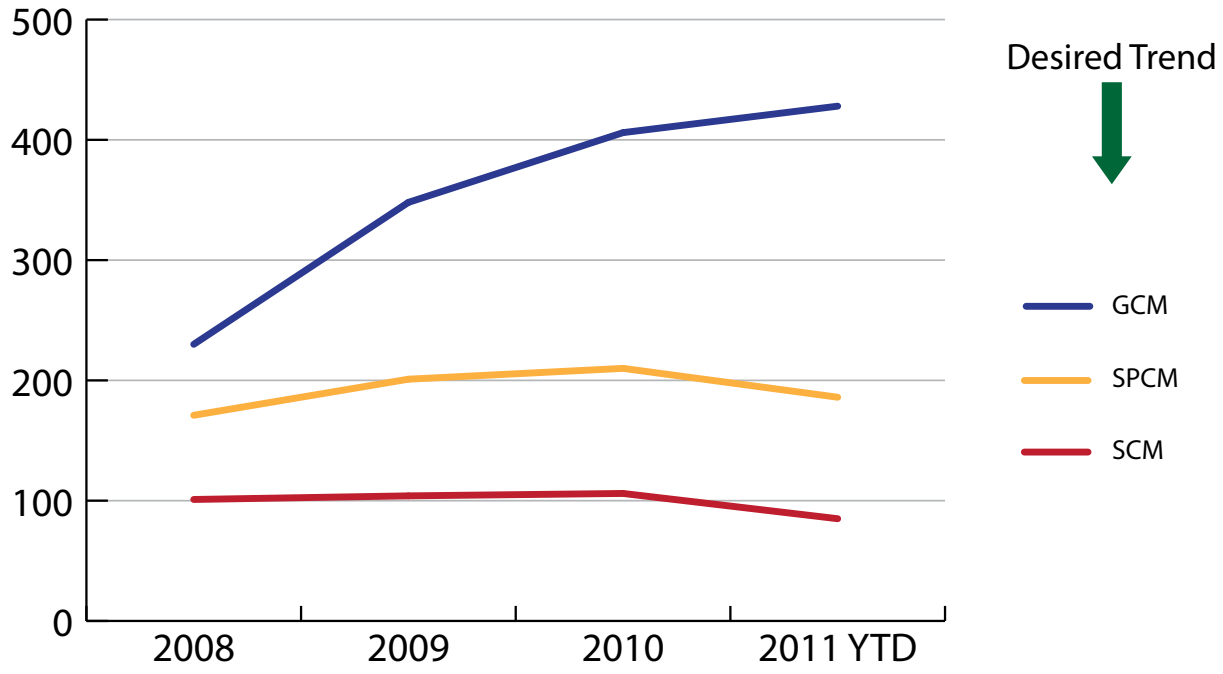
[25] Manual for Courts-Martial, United States, Pt 1, para. 3 (2008).

D2A ONE YEAR LATER—
A POSITIVE TREND

by Lieutenant Colonel Terri A. Saunders, USAF

It's been almost a year since the JAG Corps shifted gears to using discovery to action (D2A) as a measure of courts-martial processing times, rather than preferral to action. The theory, as you recall, for moving to D2A was that it would be a more accurate and transparent measure of how long a particular Airman was "out of commission" as far as his/her commander was concerned, and should ultimately lead to faster processing times. Now that we're a year out from the initiation of D2A, how are we doing?

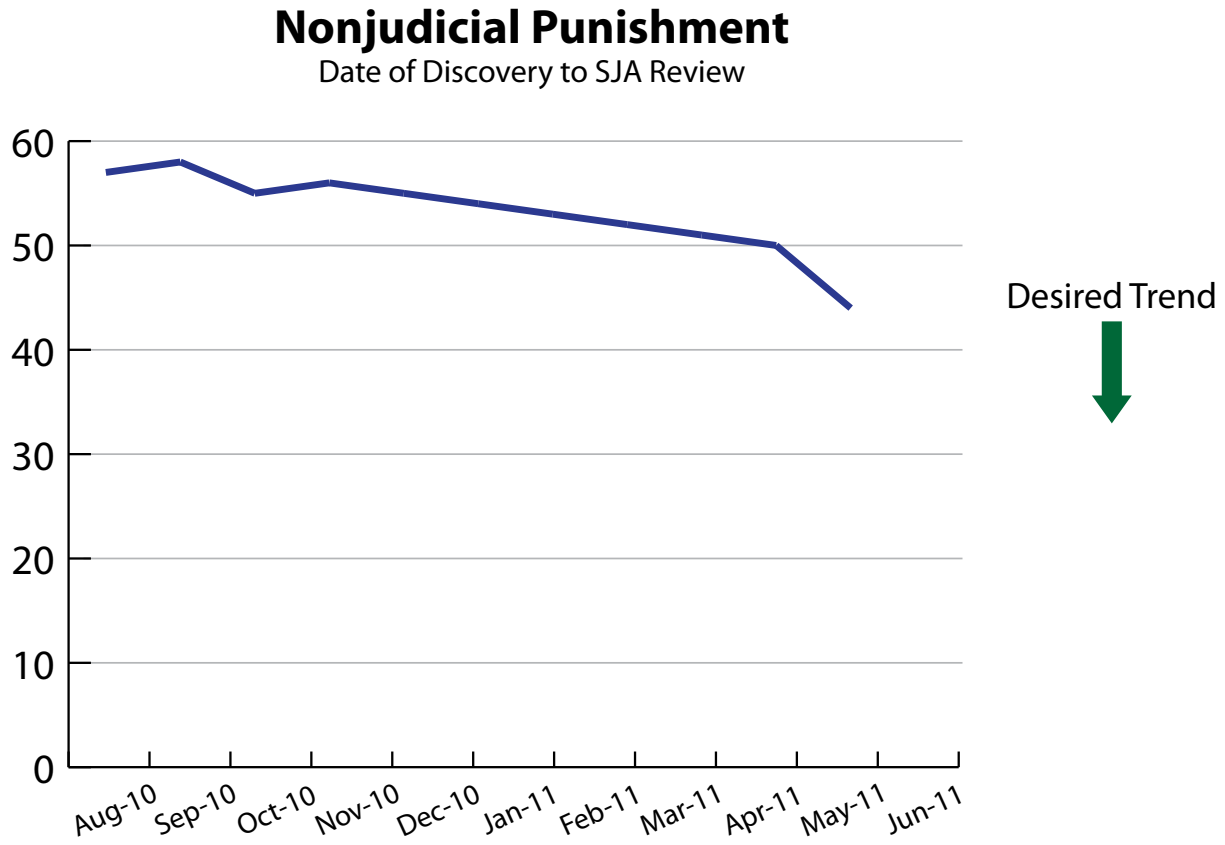
Courts-Martial D2A



Overall, we are improving. GCMs, as you might suspect, will be the last category to show significant improvement because of the length of D2A. The date of discovery predates the D2A metric for many GCMs. However, we are seeing significant improvement in the metrics for SPCMs and SCMs. For SPCMs, we are averaging 186 days YTD for 2011, vice 210 days for 2010. We've seen the most improvements in SCMs with a 15% decrease in D2A since we began tracking date of discovery in 2008.

Our courts are meeting their metrics with more frequency. This, despite a 25% increase in the number of GCMs and SPCMs so far this year over the same period of time in 2010. It shouldn't be a surprise to anyone that the investigative stage is still taking longer than we would like. We have discovered that the legal office's teaming

with the law enforcement community makes a real difference in the length of the investigation. Once the report of investigation is completed, the process is generally moving more quickly.



We have seen an even more dramatic improvement in nonjudicial punishment date of discovery to SJA review metrics.

From January through June 2010, the average number of days from discovery of the offense to SJA review was 57 days, with 25% within the 30 day metric. From January through June 2011, the average number of days was 46, with 50% within the 30 day metric. This, despite an 8% increase in the number of nonjudicial punishment actions so far in 2011 over the same period as last year.

While we still have a ways to go in terms of reducing our total processing times, the numbers show steady improvement since the introduction of D2A. By now, commanders and first sergeants are beginning to realize the positive impact of timely action on their units, which should pave the way for further improvements. We will continue to work with investigators, labs, and other outside agencies to find new ways of improving the process at the initial stages. Additionally, by now individual offices have had the opportunity to assess the health of their own military justice programs and realize areas in which improvements are needed. Now is the time for course corrections, process improvements, etc. to get to where we need to be.

TO CHARGE OR NOT TO CHARGE

HOW TO SUCCESSFULLY NAVIGATE VIRTUAL CHILD PORNOGRAPHY CASES

by Captain Jeffrey B. Garber, Captain Monica E. Nussbaum and Captain Virginia M. Bare, USAF

Pop quiz: Can you still charge "virtual" images of child pornography following the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*[1] which eviscerated the Child Pornography Prevention Act[2] (CPPA)? Based on the (incorrect) assumption these images are now legal to possess, many trial counsel do not mark them on a suspect's hard drive for further forensic review, proof analysis, or charging consideration.[3] These early decisions, based on a misinterpretation of existing military law, could ultimately prove costly in the courtroom.

Why? First, charging virtual images has always been permissible under clause 1 and 2 of Article 134 of the Uniform Code of Military Justice (UCMJ).[4] Regardless of the Supreme Court's holding in *Ashcroft*, clause 1 and 2 allow prosecution for military specific offenses that have a direct effect on good order and discipline and/or are service discrediting. This military nexus distinguishes child pornography cases under the UCMJ from the Court's rationale and civilian setting of *Ashcroft*[5].

[1] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[2] Child Pornography Prevention Act, 18 U.S.C. § 2252A, 1996.

[3] The Defense Criminal Forensics Laboratory (DCFL) limits the number of images that may be submitted for forensic analysis and a written report. If you reach that limit with images containing actual children, you may still request analysis of the virtual images.

[4] Clause 3 of Article 134 allows the charging of acts that are crimes under a federal criminal statute, in effect assimilating a federal statute into the UCMJ. While federal statutes contain useful material for setting the elements of a crime, crafting instructions and providing case structure, the best prosecutorial decision is to avoid clause 3

[5] For a discussion of charging virtual child pornography under Article 134 clauses 1 and 2 post-Ashcroft see United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004) and United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004).

Second, Congress has since passed legislation which more clearly addresses the possession of virtual images. The CPPA provision struck down by the Supreme Court was redrafted by Congress in 2003 with 18 U.S.C. § 1466A, Obscene Visual Representations of the Sexual Abuse of Children.[6] This statute criminalizes the possession of images that did not meet the standards discussed by the Supreme Court and subsequent military courts. It bans possession of visual depictions of *any kind* that portray a minor engaged in sexually explicit conduct that is either obscene or contains specific acts listed in the statute that lack serious literary artistic, political or scientific value.[7] Further, § 1466A contains definitions necessary to craft instructions for successful military prosecutions under clause 1 and 2 of Article 134, UCMJ.

Congress has since passed legislation which more clearly addresses the possession of virtual images.

Ashcroft's (Limited) Impact

Specifically, the Supreme Court found the CPPA to be unconstitutionally overbroad because it banned all sexually explicit images "appear[ing] to depict a minor" without any examination as to the depictions' obscene nature.[8] As a general rule, pornography can be banned only if obscene. But under *New York v. Ferber*, pornography showing minors can be prohibited whether or not the images are obscene, under the definitions set forth in *Miller v. California*.[9] To be obscene under the *Miller* standard, a work, taken as a whole, must appeal to the prurient interest, be patently offensive under community standards, and lack serious literary, artistic, political or scientific value.[10] Yet the Court noted the CPPA could apply to a "psychological manual as well as a movie depicting the horrors of sexual abuse" or "what appear to be 17-year olds engaging in sexually explicit activity," with no consideration as to whether the material appealed to the prurient interest.[11]

The Supreme Court did not find the Government's contention persuasive that the speech prohibited by the CPPA was "virtually indistinguishable" from actual child pornography, "which may be banned without regard to whether it depicts works of value."[12] The Court cited the *Ferber* case as precedent that the state interest in eliminating child abuse which creates actual child pornography outweighs any examination of the content of the images.[13] However, *Ashcroft* distinguished itself from *Ferber* in holding that "Ferber's judgment was based upon how [the real child pornography] was made, not on what it communicated" whereas virtual child pornography "records no crime and creates no victims by its production."[14] Consequently, the Court struck down this provision and found it severable from the law governing prohibitions on actual child pornography.

Prior to *Ashcroft*, trial counsel occasionally charged accused of possessing virtual child pornography under clause 3 of Article 134 by assimilating the CPPA into the UCMJ. Because these cases were charged under clause 3, the elements did not require evidence that the charged conduct was prejudicial to good order and discipline or service discrediting.[15] As a result of *Ashcroft*, these cases were overturned. However, military courts made clear that possession of images of minors engaged in sexually explicit conduct could be prohibited regardless of their depiction of actual or virtual children, so long as the charge was brought under clause 1 and 2 of Article 134 instead.[16]

Meanwhile in *United States v. Mason*, the Court of Appeals for the Armed Forces (CAAF) held that although the "appears to be a minor" language of the CPPA was unconstitutional as applied in a civil-

[6] *See* Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. § 1466A (2003).

[7] 18 U.S.C. § 1466A (b)(1) and (2).

[8] *Ashcroft*, 535 U.S. 234, 246 (2002).

[9] *Id*. at 240 referencing New York v. Ferber, 458 U.S. 747 (1982) and Miller v. California 413 U.S. 15 (1973).

[10] *Miller*, 413 U.S. 15, 24 (1973).

[11] *Ashcroft*, 535 U.S. 234, 246 (2002).

[12] *Id*. at 249, citing *Ferber*, 458 U.S. 747, 761 (1982).

[13] *Id*.

[14] *Id*. at 250-251.

[15] For a discussion of pre-Ashcroft clause 3 child pornography possession cases see United States v. O'Connor, 58 M.J. 450 (C.A.A.F. 2003). *See* United States v. Candejas, 62 M.J. 334 (C.A.A.F. 2006) for a discussion of how clauses 1 and 2 are considered lesser included offenses of clause 3 and how C.A.A.F. would have upheld a conviction under clause 3 had evidence been introduced as to prejudice to good order and discipline or that the act was service discrediting.

[16] *See Mason*, 60 M.J. 15 (C.A.A.F. 2004) and *Irvin*, 60 M.J. 23 (C.A.A.F. 2004).

ian criminal proceeding it could be prosecuted as prejudicial to good order and discipline and service discrediting under clause 1 and 2.[17] However, the definition of "appears to be minor" was not provided by CAAF. In other words, no guidance was given as to how "virtual" is virtual enough for a court-martial conviction.

In *Beaty*, CAAF held that cases using the traditional virtual pornography charging language of "what appears to be a minor" do not carry the standard ten year maximum sentence of actual child pornography, but rather are only punishable as simple disorder under Article 134.[18] CAAF held that since virtual child pornography is not a listed offense in the UCMJ, that R.C.M. 1001(c)(1)(B)(ii) governed the maximum punishment. R.C.M. 1001(c)(1)(B)(ii) holds that if an offense is not listed the maximum sentence is as listed in the U.S. Code or as authorized by the custom of the service.[19] However, this case did not mention 18 U.S.C. 1466A or the fact that it specifically prohibits such virtual pornography and contains the 10 year confinement provision found in the U.S. Code for actual child pornography.[20]

Congress Strikes Back

In 2003, in response to the *Ashcroft* decision Congress passed 18 U.S.C. § 1466A as part of the PROTECT Act.[21] This statute reinstated and greatly expanded the ban on producing, distributing, receiving, possessing with intent to distribute, or possessing virtual child pornography. Congress sought to eliminate any ambiguity as to intent the statute, which covers visual depictions "of any kind, including a drawing, cartoon, sculpture or painting."[22] Banned images are divided into two groups.[23] The first group covers those visual depictions that depict a minor engaging in sexually explicit conduct and are obscene.[24] The second group includes listed sexual acts depicting images that are, or appear to be of, a minor, and which lack serious literary, artistic, political or scientific value as stated in the third prong of the *Miller* obscenity test.[25] The first group seems intended for visual depictions showing the "lascivious exhibition of the genitals" and requires a full showing of obscenity. The second group does not require a full showing of obscenity. It appears Congress intentionally made the judgment the sexual acts listed are per se obscene, and hence by their nature appeal to the prurient interest and offend community standards under *Miller*.

§ 1466A also provides clear guidelines as to Congressional intent on what types of images are prohibited: visual depictions of any kind. It addressed many, but not all, of the concerns raised in *Ashcroft*. Regardless of this statute's potential future constitutional interpretation by civilian courts, it provides useful definitions and guidelines for judge advocates prosecuting cases under clause 1 and 2 of Article 134.[26] When trial counsel are relying on § 1466A, the best course of action is to argue that images be analyzed under the full *Miller* standard by the fact-finder.

It is important to note that § 1466A is not being charged under clause 3 of Article 134. Rather, you are merely using the statute's guidance and language to prove that the accused's possession of virtual

[17] *Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004). *See* United States v. Forney, 67 M.J. 271 (C.A.A.F. 2009), for a conviction for conduct unbecoming an officer on a charge of possession of virtual child pornography that is protected free speech if done in a civilian setting.

[18] *See* U.S. v. Beaty, 70 M.J. 39 (C.A.A.F. 2011).

[19] *Id*. at 42.

[20] 18 U.S.C. 1466A (a) and (b).

[21] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. 108-21, enacted April 30, 2003.

[22] 18 U.S.C.A. § 1466A(b).

[23] Both § 1466A(a) and (b) are divided into these two categories.

[24] *Id*. at (b)(1)(A) and (b)(1)(B). The term "sexually explicit conduct" is actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area. The definition of sexually explicit conduct for the purposes of analyzing images under § 1466A is found in the statute prohibiting actual child pornography at 18 U.S.C. § 2256(2)(A) and (B).

[25] *Id*. at (b)(2)(A) and (b)(2)(B) includes "graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex."

[26] For a critical analysis of the PROTECT Act, *see* Susan H. Fosse. *Try, Try Again: Will Congress Ever Get it Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions,* 38 U. Rich. L. Rev. 721, (2004), and John P. Feldmeier, *Close Enough For Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. Ky. L. Rev. 205, 227 (2003).

child pornography was prejudicial to good order and discipline and/or service discrediting under clause 1 or 2. Do not rely on the per se obscenity judgment of Congress because the constitutionality of that provision of the statute has not yet been fully vetted.[27] If you believe that virtual images in your case do not appeal to the prurient interest or violate community standards (and are forced to rely on the per se obscenity judgment) then you should seriously reconsider the decision to charge them.

This statute does not only cover actual knowing possession of "virtual" child pornography but also prohibits the attempt or conspiracy to possess such material. As noted earlier, the penalty for a violation of § 1466A is identical to that provided in the statutory prohibition on actual child pornography.[28] There is no requirement that the minor depicted in any of the charged images actually exist.[29] The statute applies only if the charged images have been shipped, transferred or produced using materials that have been shipped or transferred in interstate commerce, to include by computer.[30] An affirmative defense to knowing possession applies if less than three images are possessed and, without allowing further access to the images, reasonable steps are taken to promptly destroy the images or report the images to law enforcement.[31]

§ 1466A Hits the Courts

The legal mettle of § 1466A was tested in three recent civilian cases, all worth reading before a trial where virtual images of child pornography are contested. On multiple fronts, defendants attacked the law as unconstitutionally vague, overbroad, and in violation of First and Fifth Amendment protections.

In *United States v. Whorley*, the United States Eastern District Court in Virginia denied the defendant's motion to dismiss an indictment on constitutional grounds for downloading and receiving pornographic anime cartoons of minors at his workplace.[32] The defendant appealed his case to the United States Fourth Circuit Court of Appeals.[33] The Fourth Circuit held Congress was not infringing upon the merely private possession of obscene materials in one's home, even though the statute prohibited images containing depictions of fictional children, the charge for receiving images under § 1466A(a)(1) survived constitutional scrutiny because it required a showing of obscenity.[34]

The Fourth Circuit's reliance upon the statute's *Miller* obscenity standard in (a)(1) begs the question of how the court would have ruled on receipt of images containing the listed sexual acts of (a)(2) and possession of images with the listed sexual acts in (b)(2) which do not require a full showing of obscenity.[35] On January 11, 2010 the United States Supreme Court denied Whorley's petition for certiorari.[36] It also begs the question of whether the Court was waiting to voice its' opinion as to the constitutionality of the statute in a case that directly implicated the (a)(2) and (b)(2) sections of the statute which used the Congressionally modified *Miller* obscenity standard.

Next, in *United States v. Handley*, the United States District Court for the Southern District of Iowa held that § 1466A(a)(2) and (b)(2) were unconstitutionally overbroad.[37] The defendant was charged with receipt and possession of obscene anime images of minors engaged in sex acts.[38] While dismissing the defendant's other claims, the court ruled that § 1466A(a)(2) and (b)(2) were unconstitutionally overbroad because those sections did not require a full showing of obscenity under the *Miller* standard, since they only required the depiction lack literary, artistic, political or scientific value under the third prong of the *Miller* test.[39]

[27] *See* the following section of this article for the discussion for case law discussing the constitutionality of this provision of the statute.

[28] *Id*. referring to 18 U.S.C. § 2252A(b)(2). However, in the wake of C.A.A.F.'s Beaty decision it is very likely charging using the standard "appears to be a minor" language will carry only the four month disorder confinement maximum under Article 134 even if trial counsel references 18 U.S.C. 1466A. *See* United States v. Leonard, 64 M.J. 381 (C.A.A.F. 2007) for a discussion on under what circumstances you should use comparable federal statutes in determining a sentencing maximum when charging under clause 1 and 2 of Article 134.

[29] 18 U.S.C.A. § 1466A(c).

[30] *Id*. at (d)(4).

[31] *Id*. at (e).

[32] United States v. Whorley, 386 F.Supp.2d 693 (E.D. Va. 2005).

[33] United States v. Whorley, 550 F.3d 326 (4th Cir. 2008).

[34] *Id*. at 337.

[35] The Fourth Circuit avoided this issue by mentioning in a footnote that since Whorley was not convicted under § 1466A(a)(2), (b)(1) and (b)(2) they were not ruling on those statutory provisions. *See Id*. at 337, fn. 2.

[36] Whorley v. United States, 130 S.Ct. 1052 (2010).

[37] United States v. Handley, 564 F.Supp.2d 996 (S.D. Ia. 2008).

[38] *Id*.

[39] *Id*. at 1005.

The government argued the depictions exhibiting fictional minors engaged in the listed sexual acts were per se obscene but the court disagreed.[40] The court found the *Miller* standard was not a matter for Congress to address under a national standard for what appeals to the prurient interest or what was patently offensive, although the court's opinion did suggest that Congress could include a reference to a national standard rather than the community standard of *Miller*.[41] Thus, the Court held the government failed to provide any authority that indicated Congress can usurp the function of the fact-finder by doing away with portions of the *Miller* obscenity test.[42] *Handley* further held that pornography could only be banned if it was obscene in accordance with the *Miller* standard or involved actual minors.

Finally, in *United States v. Dean*, the defendant was charged with producing a depiction of a minor in violation of § 1466A(a)(2), which does not require a showing of obscenity (and which *Handley* declared unconstitutional).[43] Dean argued the same points addressed by the court in *Handley* and while bringing a facial attack on the statute on overbreadth grounds, he did not contend the statute was unconstitutional as it was applied to him.[44] The Court recognized that "the overbreadth doctrine is strong medicine and [is] employed with hesitation, and only then as a last resort."[45] In raising a facial challenge, one must show that the overbreadth of the statute prohibits a substantial amount of protected speech "not only in an absolute sense but also relative to the statute's plainly legitimate sweep."[46]

The Court also noted that to be prohibited an image must depict actual children or be obscene under the *Miller* test.[47] However, the Court recognized the statute "does not require the images to be obscene under *Miller*" and "as other sub-parts of the statute do require obscenity, [this suggests] that the failure to fully incorporate the *Miller* test was intentional."[48] The Court concluded that section (a)(2) was "intended to apply to obscene images" because of its title, place in the criminal code and the inclusion of the third prong of the *Miller* test.[49] Despite Congress' incomplete incorporation of the *Miller* test, the court still found that while § 1466A may reach some protected speech it survived a facial attack because it did not unduly burden a *substantial* amount of protected speech.

The Court concluded that section (a)(2) was "intended to apply to obscene images" because of its title, place in the criminal code and the inclusion of the third prong of the Miller test.

The *Dean* court then addressed *Handley* by noting that as "there is nothing in the face of the *Handley* opinion itself to indicate how substantial speech is burdened by the statute, this court cannot understand the basis for that court's conclusion."[50] Lastly, the Court differentiated the case from *Ashcroft* by noting the *Ashcroft* decision was based in part on the CPPA's incursion into the arts and § 1466A(a)(2) included the third prong of the *Miller* test which excluded from its' scope that large amount of protected speech.[51] In closing, the Court noted that although some defendant may be able to show the statute was unconstitutional as applied, a facial challenge must fail because the statute did not burden substantial amounts of protected speech.[52]

On appeal, the 11th Circuit held § 1466A was not overbroad.[53] While the appellate court found the lack of full incorporation of the *Miller* standard troubling

[40] *Id.* at 1005-1007.

[41] *Id.* at 1006, discussing Smith v. United States, 432 U.S. 291 (1977).

[42] Handley, 564 F.Supp.2d 996, 1007 (S.D. Iowa 2008), referencing Ashcroft, 535 U.S. 234, 240 (2002).

[43] United States v. Dean, 670 F.Supp.2d 1285 (M.D. Ala. 2009).

[44] *Id.* at 1291.

[45] *Id.* citing Ferber, 458 U.S. 747, 769 (1982).

[46] *Id.* citing United States v. Williams, 553 U.S. 285 (2008).

[47] Dean, 670 F.Supp.2d 1285, 1292 (M.D. Ala. 2009).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 1292-1293.

[52] *Id.* at 1293.

[53] U.S. v. Dean, 635 F.3d 1200, 1203 (11th Cir. 2011).

it held "the amount of protected material prohibited by the statute pales in comparison to the statute's legitimate sweep".[54]

Prosecution Under Article 134

Clause 1 and 2 of Article 134 are military specific crimes and must be judicially examined according to the unique context in which they are prosecuted. As an illustrative example, the authors recently prosecuted a case involving both real and virtual child pornography under clause 1 and 2 of Article 134 using the § 1466A framework as discussed earlier.

This case originated after images of suspected child pornography on the accused's external hard drive were found by a fellow Airman to whom he had lent the device. After viewing the evidence it became apparent to trial counsel there were images of actual children that met the standard for prosecuting under Article 134. However, virtual images were also found on the media belonging to the accused which showed children engaged in sexually explicit conduct involving sadomasochism and torture. These images were extremely aggravating due to the conduct portrayed but also because of the method in which they were stored. Further, the files were password-protected on a folder entitled "good finds." This fit neatly within the definitions of § 1466A and seemed perfectly designed for the language of the statute and it could be used for findings instructions. Consequently, the accused was charged under clause 1 and 2 of Article 134 in a separate specification from the images depicting actual minors.

The specification was crafted to state that the accused did "wrongfully and knowingly possess visual depictions of what appear to be minors engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces." This language mirrors the definitions and terms of § 1466A(b)(1) which specifically lists the term "sexually explicit conduct which is obscene." Furthermore, § 1466A(b)(2) lists prohibited acts and then holds that the images must lack serious literary, artistic, political or scientific value. Clause 1 and 2 allow trial counsel to use the statute without actually charging it, so long as the charged misconduct affects good order and discipline or is service discrediting.

The defense asserted at the Article 32 hearing and at trial through a motion to dismiss that the "appears to be a minor" dilemma could be answered by examining the language of the opinion of Justice O'Connor in *Ashcroft*.[55] Specifically, Justice O'Connor found that a proper constitutional interpretation of the "appears to be a minor" language from the CPPA was that the images be "virtually indistinguishable from" actual children.[56] The defense also pointed to the Congressional report which supported the passage of the CPPA. In the legislation's accompanying findings and purpose report Congress cited the growth in new technologies that made it possible to create images of minors which were "virtually indistinguishable" and "virtually impossible" to tell the difference from images of actual children.[57] Defense counsel argued the images charged were cartoonish and not sufficient to support a conviction because they were not "virtually indistinguishable" from actual children.

The images charged were certainly not "virtually indistinguishable" from actual children, which the government readily conceded. However, they were not "cartoonish." An apt description was given by the Article 32 Investigating Officer (IO) in her report. While the IO admitted one would not mistake the images for real people, they were "disturbingly human," depictions of minors with emotionally expressive faces engaged in acts of "sexual activity and torture."

In its motion, the defense also raised the First and Fifth Amendment issues addressed in *Whorley, Handley* and *Dean*. Certainly, service members are entitled to the right to free speech.[58] But the First Amendment rights of military members differ from those of civilians.[59] Moreover, the prosecution pointed out that while the statute did not require a showing of obscenity, the images would clearly meet the *Miller* standard. The defense also cited the "virtually indistinguishable" standard of *Ashcroft*.

[54] *Id*. at 1205.

[55] Ashcroft, 535 U.S. 234, 260 (2002), Justice O'Connor's dissenting opinion joined by Chief Justice Rehnquist and Justice Scalia.

[56] *Id*. at 264.

[57] Senate Report 104-358, Child Pornography Prevention Act of 1995.

[58] U.S. v. Priest, 45 C.M.R. 338, 334 (1972).

[59] U.S. v. Brown, 45 M.J. 389, 396 (C.A.A.F. 1996).

We responded by directing the trial court's attention to § 1466A and emphasizing that the charge was brought under clause 1 and 2 of Article 134. This removed the issue from a traditional constitutional analysis under *Ashcroft* and instead made the case a matter of whether the conduct of the Accused was prejudicial to good order and discipline and/or service discrediting.

Finally, the defense argued the statute was void for vagueness under the Fifth Amendment. Defense counsel correctly noted that military courts have followed the maxim that acts were void for vagueness if "one could not reasonably contemplate his conduct was proscribed."[60] But the plain language of § 1466A was clear. It prohibited the possession of a visual depiction of any kind that portrayed a minor engaged in the sexual acts, if the images in question lacked serious literary, artistic, political or scientific value. After a hard-fought motion hearing, the military judge agreed with trial counsel that the material could be constitutionally prohibited and charged under Article 134 clause 1 and 2. The accused was ultimately convicted of knowing possession of the "virtual" images, as well as knowing possession of images depicting actual minors engaged in sexually explicit conduct.

Conclusion

What should you know before prosecuting "virtual" child pornography in the military? First, understand that the government should charge offenses under Article 134 clause 1 and 2 and use § 1466A as its prosecutorial sword. The safest path is to use this statute for its helpful definitions and instructions. But be sure to differentiate Article 134 clause 1 and 2 from a prosecution under § 1466A, and to ensure the fact finder analyzes the images under the full *Miller* obscenity standard. If the images in your case don't meet the *Miller* standard then perhaps the images should not be charged.

While constitutional issues raised in courts-martial are different from those in civilian trials, questions still remain. How "virtual" is virtual enough? How disturbing should the depicted conduct be before the decision is made to charge? The images in the child pornography case our team prosecuted were very realistic and highly disturbing; therefore, the decision was made to charge them. But each case and each image is unique. Trial counsel must carefully evaluate what charging the images offers the case. Do the images under consideration place other images, perhaps images of actual children, in context as to the true nature of the accused's actions or intent? Ask yourself: if there were no "real" child pornography images in your case, would you still charge the virtual images alone?

All things considered, if you have the evidence to charge virtual images under Article 134 clause 1 and 2, you should do so if it places your case in the proper context. The true standard may be the words of Justice Potter Stewart describing how he determined what is pornographic: "I know it when I see it."[61] Using good judgment, sound discretion, and a solid footing in the law, trial counsel must know the right images to charge when they see them.

[60] Parker v. Levy, 417 U.S. 733, 752 (1974).

[61] Jacobellis v. Ohio, 378 U.S. 184 (1964).

MORE THAN THE SUM OF ITS PARTS

ADER Adds Up to Defense Military Justice Success

by Mr. Brian J. Suckman

The process of designing, developing, and deploying a typical computer program is a complicated procedure that takes months or years to complete. The goal is always that users end up with is an easy-to-use program that helps them accomplish their missions. What happens between the idea for a program and its first use is a complex exchange of ideas that move from the customer, who asked for the program, to the functional's[1] design, and then finally the programmer's skillful crafting of thousands of lines of code to transform vision into reality.

For the past two and a half years, I have had the good fortune to be the functional for the Area Defense Electronic Reporting (ADER) program. Initially designed five years ago, ADER exemplifies the way in which programs grow and mature and also shows how critical technology is to military justice. In December 2004, AFLOA/JAJD approached JAS to develop a case-management program for the defense community similar to AMJAMS. When JAS released the initial version two years later, ADER gave Area Defense Counsel (ADC) personnel the worldwide ability to track client visits, create and record client conflicts, transfer cases to resolve conflicts and to equally apportion workload among ADCs, schedule case-related events and accomplish enhanced statistical reporting.

When I arrived at JAS in 2008, the current program was functioning beyond its intended purpose, and it showed. Users were unhappy with the interface (the input screens), AFLOA/JAJD wanted the program to contain more information fields, and everyone wanted the ability to produce reports and a searchable database of defense cases. What was needed was not a facelift of the old program but a complete rewrite of the code from the ground up.

As the program functional, my job was to be the center of the team put together to transfer ideas into reality. I was also there to translate the legal process into concepts for the computer programmers so the program would have the necessary functionality to mirror the work done by the defense community. In the end, it took a strong team of individuals to see this program through to completion.

For the development of ADER 2.0, I worked closely with Major Paul Dawson, AFLOA/JAJD, to ascertain the types of functions he thought the program should have. He provided me with copies of reports the ADC and Defense Paralegal (DP) are required to fill out and submit to JAJD. We also discussed

[1] A "functional" is a project manager who is responsible for collecting requirements from a customer and working with the computer programming team and customer to turn concept into reality.

how the program should handle clients and what information should be collected for future case searches. Over the next four months, we exchanged ideas and developed a template of a new ADER program and how it should look on the individual user's computer monitor. The next step was to turn the concept over to the other part of the development team, the programmers.

When legal professionals write, they use words to graphically tell a story and advocate their case. This may be as short as a one-page memorandum or a many-paged motion before a court or board. Computer programmers on the other hand have a language (actually multiple languages) all their own that instructs computers on how to operate. While legal professionals struggle to find the right word to express a concept, programmers too struggle to find the right syntax to properly instruct a computer. While a legal brief with a typo may be embarrassing, a line of code with the wrong syntax or expression or typo can completely stop a program before it even starts.

Turning concept into reality starts by working with the programmers on the general features of the program and how that relates to the workflow of the defense community. Typically, the programmers do not have experience in military justice matters, so one of the first steps was to walk Mr. Dennis Cosby and Mr. Terry Wyatt through the various actions and their associated workflow. Then, the magic happens. Giving two talented programmers a template and some guidance produced a program that far exceeds the expectations JAJD or I had. Mr. Cosby and Mr. Wyatt were able to incorporate unique interface features to greatly improve the basic functionality requested for ADER. All along the way, Maj Dawson and I would sit down to discuss the progress and review the program and work with the programmers to make sure any overlooked items were incorporated into the finished product.

Not content to rely on just the JAJD and JAS perspective on the program's development, we demonstrated the new version of ADER before SSgt Crystal Chapman, the Maxwell DP; the defense instructor-litigators at the JAG School; and former ADCs, senior defense counsel and DPs assigned to the school. Their insights into what the program should do enabled us to ensure the necessary functions for the base users would be in place when the program was released.

As programming reached the end of its cycle, a talented team of program testers assembled to put ADER through its paces to make sure all the functions worked as designed and programmed. Mr. Bill Emery headed the test team and worked with both the programmers and me to ensure he understood how the program worked. His team tested each field and function collecting a list of "bugs" to be fixed by the programmers before final release.

ADER 2.0 is first and foremost a program to help ADCs and DPs manage their ever-expanding caseloads.

ADER 2.0 is first and foremost a program to help ADCs and DPs manage their ever-expanding caseloads. The defense community can now track important steps as cases progress from initial client visits all the way to final action. In addition, ADER 2.0 roughly doubles the number of data fields being collected. Users now have a defense-oriented, searchable case database, while the program can also automatically generate reports for JAJD.

Between design, programming, testing and release, ADER spent a total of 18 months in production—an incredibly short time to produce a complex program with thousands of lines of code and that encompasses every aspect of the defense community's work product. Although a major update and improvement over the old version of ADER, the new version is just a start and, like other computer programs, will always be improved. Those improvements will come from the teams that will use ADER every day.

Partners in Crime

ENHANCING OSI, SFOI AND JAG RELATIONS THROUGH MEMORANDUMS OF UNDERSTANDING

by Captain Dakota M. Fiori, Captain Lorraine M. Sult, Special Agent Michael Goodrich and Technical Sergeant Bradley Chambers, USAF

In late summer of 2010, the Luke AFB military justice team set its sights on enhancing relations and solidarity with the Air Force's Office of Special Investigations (OSI) and the Security Forces Office of Investigations (SFOI). In an effort to memorialize these teaming efforts, a Memorandum of Understanding (MOU) was signed with OSI on 28 Dec 11 and with SFOI on 13 April 11. These documents highlight mutual investigative goals, institute processes aimed to move cases efficiently, and ensure that justice is maximized. Although there are slight differences between the OSI MOU and the SFOI MOU, at their hearts, both focus on enhancing the investigative process.

The Benefits of MOU Use

When a new case is identified by OSI and a lead agent has been assigned, the Luke legal office is informed within 24 hours. In turn, our office will assign a trial counsel and case paralegal to the case within the day. Before the first subject or key witness interviews are held, the lead agent and the trial counsel meet to discuss investigative goals and to review the elements of the suspected offense. Following the interview, the lead agent and the trial counsel review the information from both the statement and the interview recording. This immediate review allows the trial team to become familiar with the case early on, spot legal issues that arise, and provide feedback to the OSI agent interviewing the subject or witness.

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Additionally, it allows a means of quickly determining if further interviewing is necessary while the subject or witness is still cooperative. For OSI and SFOI, the intent of the trial team's collaboration before and after the interview is to allow the OSI/JA team to begin working together as early as possible during the investigation in a way that furthers both members' objectives. For the agent, the prosecutor's consultation throughout the investigative process means ready legal advice and guidance to ensure elements of proof are met. For the trial team, this allows for assistance with trial preparation instead of waiting for the receipt of the Report of Investigation (ROI).

In the time leading up to the publishing of the ROI, the trial counsel remains in contact with the lead agent while preparing the proof analysis. Evidence and other information are shared between the investigative agencies and the Luke legal office on a case-by-case basis. Upon receipt, the paralegals increase their involvement in the case to include prepping for future witness interviews and managing discovery. The legal office ensures that no evidence is released without the investigative agency's consent. Furthermore, witness availability of the agents assigned to the case is obtained. This collaborative process continues until trial. Overall, the MOU provides guidelines, goals, and standards that both the Luke legal office and the investigative agencies use when undergoing the investigative process.

In an effort to strengthen these partnerships, numerous morale building activities were scheduled throughout the year. For example, in early spring, OSI hosted an afternoon barbeque during the Luke Air Force Base Open House and Air Show. Recently, the Luke legal office and law enforcement personnel went head-to-head during an ultimate Frisbee game. These morale building activities have established a solid working relationship that translates into success in the courtroom.

Cases Studies

As JAG Corps members can attest, early partnership with investigators is critical in moving a case forward swiftly and efficiently. MOUs with base investigators further enable this process. An illustrative example can be seen in the courts-martial of *United States v. John* and *United States v. Doe*.[1]

United States v. John

Last October, the Luke legal office was notified that Airman John tested positive for heroin as a result of a random urinalysis. OSI brought Airman John in for questioning and once the interview was completed, the case agent, Investigator Bennie Prescott, and Capt Dakota Fiori, the acting Chief of Military Justice, met to discuss ways to prove Airman John's drug use aside from the Drug Testing Report. The case was then handed over to trial counsel and Capt Lorraine Sult worked with Investigator Prescott to discuss interviewing any further witnesses. Together Capt Sult and Inv. Prescott learned of a civilian witness who had been a high school friend of the accused. Inv. Prescott drove four hours to interview the witness. During that interview, Inv. Prescott contacted Capt Sult to keep her apprised of the information and asked if she had any further questions. Because of their communication during the investigation, and this final witness interview, Luke was able to corroborate Airman John's heroin use during the charged time frame and also learn that Airman John had used heroin prior to entering the Air Force. The accused had not disclosed this drug use on his enlistment paperwork.

As a result of this lie, an additional specification of fraudulent enlistment was preferred against Airman John. Working alongside trial counsel was the case paralegal, SSgt Miranda Rubio who sat in on all witness interviews, and worked with OSI to have a subpoena served on this key civilian witness. SSgt Rubio also maintained a regular line of communication and built a positive rapport with this very reluctant witness. The case went to trial the first week of January 2011, and though it looked at first that it would be fully litigated, Airman John changed his

[1] Actual case names have been changed

pleas and forum the day before trial to a guilty plea judge alone, without a pretrial agreement. No doubt, securing this key civilian witness's appearance at trial persuaded the accused to plead guilty. Without the close working relationship between the legal office trial team and OSI, Luke would have never been able to uncover this additional evidence and take this court from date of discovery to action in under 80 days.

United States v. Doe

Capt Sult also had the opportunity to partner with SFOI on the case of *United States v. Doe*. In January 2011, Luke learned that Airman Doe had been involved in a hit and run accident, shortly after leaving an off-base party where he was observed drinking alcoholic beverages. However, instead of reporting the accident Airman Doe filed a false police report stating that someone had stolen his car. He then told his friends at the party not to tell investigators what really happened. SFOI was assigned to the investigation and Capt Sult contacted the NCOIC of Investigations at Security Forces to coordinate.

As SFOI began interviewing witnesses, Capt Sult was informed when the interviews would take place and discussed with SFOI what specific pieces of information would be needed to prove the case. After every interview Capt Sult was provided a copy of the written statements. This case involved three charges with a total of seven specifications, and ten civilian witnesses. Not only was SFOI eager to go out and interview the civilian witnesses, but they also helped Capt Sult when she found the witnesses to be uncooperative during trial preparation. SFOI also served all of the civilian witness subpoenas and ensured they would make it to court when needed to testify.

Throughout the above investigative process the case paralegals augmented the reach of trial counsel by interviewing witness and working with SFOI to ensure all ten civilian witnesses were subpoenaed. Specifically, TSgt Donna Eggins interviewed several witnesses in trial counsel's absence, drafted ten witness civilian subpoenas and assisted trial counsel with other interviews. Additionally, MSgt Rayshieta Cole and A1C Jin Yang also assisted on witness interviews, both on-and-off base. These efforts forged a deeper working relationship between SFOI and the trial team.

Teaming with SFOI from the inception of the investigation helped to move a complicated case along quicker while making the managing of ten civilian witnesses much more bearable.

Ultimately, Airman Doe turned down an Article 15 and this case became a fully-litigated court-martial. Airman Doe was found guilty of filing a false police report and for interfering with an investigation by telling a witness not to talk to investigators. Teaming with SFOI from the inception of the investigation helped to move a complicated case along quicker while making the managing of ten civilian witnesses much more bearable. Overall, the strengthened relationship between SFOI and the legal office increased intra office communication and created a dynamic team that produced an even more exceptional product.

Conclusion

Overall, this strengthened partnership between the Luke legal team, OSI and SFOI has enhanced investigative efforts and ultimately led to a better trial product. The processes are immortalized in MOUs act as guidelines for trial counsel and the investigative agencies. Ultimately this process has resulted in swifter justice, enhanced good order and discipline, and allows commanders to ensure mission success.

An Open Letter to Military Justice Teams

Are you prepared to become an Article 15 Master?

by Airman First Class Alec M. Knoles, USAF (aka "The Article 15 Master")

Working in the military justice section at first glance can be intimidating, with its many rules, restrictions, policies, and metrics. As a new paralegal, the biggest uphill battle is the nonjudicial punishment metric. Everyone now should know about the requirement to serve the Article 15 within 10 days from discovery, with the overall emphasis being on the 30 days from discovery to SJA review. But getting there can feel like an uphill battle. What I've learned from my team at the 366th Fighter Wing Legal Office is that preparing for combat is halfway to winning the battle itself. Ask yourself: are you prepared to become an Article 15 Master?

Let's start with celerity or your team's swiftness in handling military justice cases from the moment of discovery. What is the first and most important piece needed to speed up processing times? The answer is credibility. Attorneys need to be able to rely on their paralegals to get information about offenses as soon as possible. That means before they ask, the paralegal needs to have already learned about the offense and received or requested the evidence. If you are a military justice professional without access to the daily blotter, you need to try to change that.

Ready, Willing, and Eager

First Sergeants need to know you are ready, willing, and eager (not just able) to prepare their actions

as quickly as you can. A close relationship with First Sergeants is more than a "best practice," it is vital to your ultimate success as a military justice paralegal. When the First Sergeants know that you are absolutely prepared to get an Article 15 drafted and ready to serve within an hour, they will call you within minutes of learning about the offense themselves. First Sergeants need those people they can ask virtually anything: we are those people!

Challenge

Challenge your commanders and First Sergeants to challenge you. Provided you have sufficient evidence on the day of the offense, why not give them the completed Article 15 for a "same day serve" when the opportunity presents itself. Speedy justice pleases leadership, but more importantly, the effective and expeditious resolution of a disciplinary issue is, in most cases, in the best interest of all parties, including the accused. Continue that expeditious service again when it comes time for punishment. If commanders find the accused guilty, offer to complete the punishment fast enough so they can again serve the same day. Don't sacrifice quality for speed, but if the evidence is sufficient, get it done!

Checklist

Next is the checklist. Make it basic, and cover everything, whether the form generator does it for you or not. Ask questions like "did the commander initial indicating his/her decision to file the action in the offender's UIF (Is UIF entry mandatory)?" The one time a commander decides not to file it in the UIF, you better know if it is mandatory to send it back, unless you want a legally insufficient Article 15, and an error. If after two months, a paralegal (new or old) is still making errors on NJP actions, something is wrong. A good checklist can help avoid mistakes.

Goals

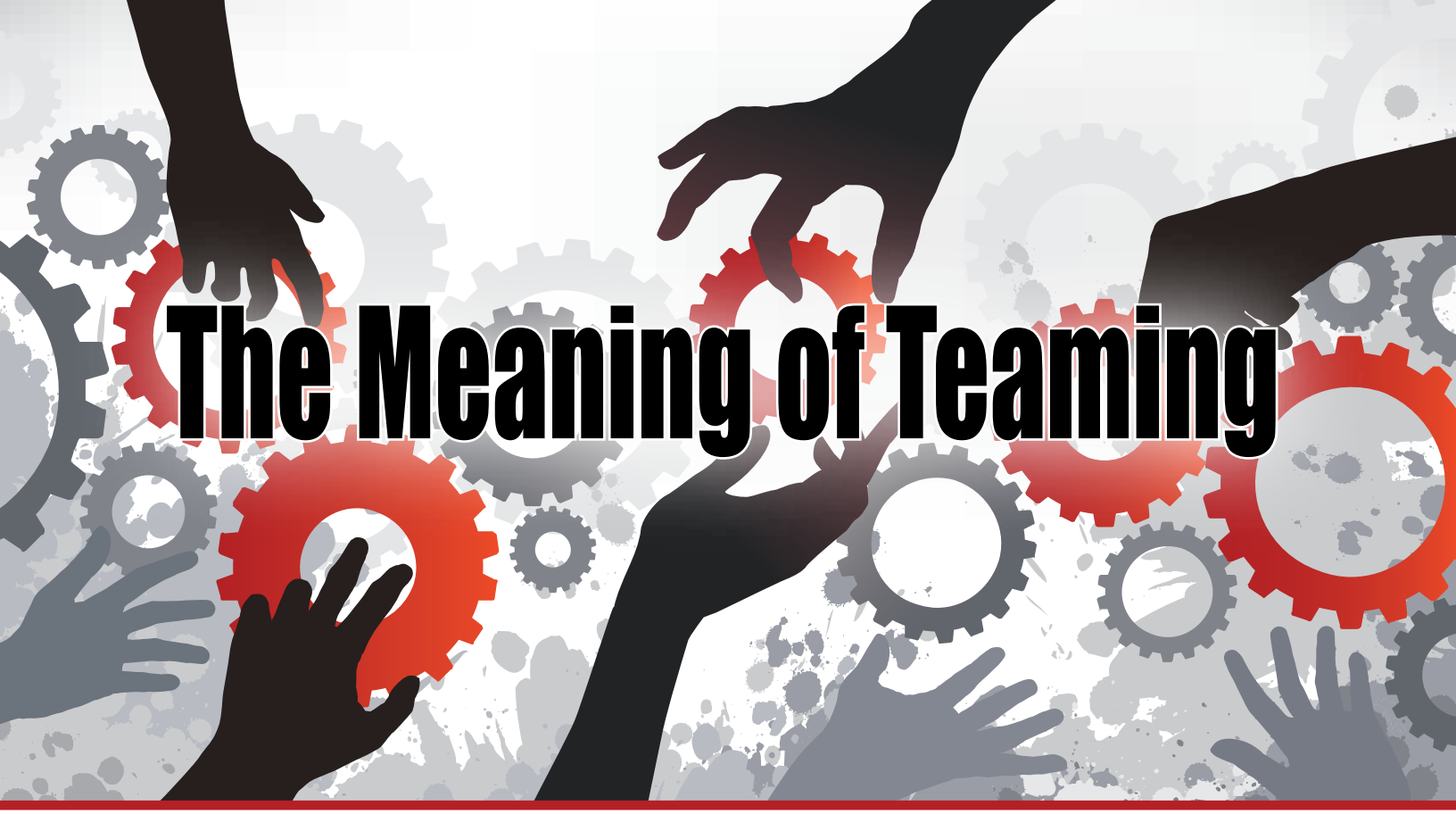
Finally, remember our goals. No commander wants tardy or stale Article 15s; no accused wants to wait long for resolution, and no legal office wants more than one or two pages of NJP actions on their Cases in Progress report. We, as legal professionals, should take pride in our work, and pride in our timely service to our client, the United States Air Force. Don't hate the new NJP metric; own it! Make the NJP metric your personal goal, and strive to exceed that goal with every Article 15. The faster these are completed, the better you look as a professional, as an office, and as a team. In addition, you get the joy of filing that folder away and not having anything else to do with it (assuming there is no vacation action).

No Commander wants tardy or stale Article 15s, no accused wants to wait long for resolution, and no legal office wants more than one or two pages of NJP actions on their Cases in Progress report.

Summary

In the end, metrics are an opportunity not just to make your base legal offices look good, but to set the standards for future success. We are lucky to be members at a pivotal point in the JAG Corps, which gives us the best chances at leaving our mark. Strive to take the underlying challenge of the metric and exceed it by completing 90% of your Article 15s within 30 days. You now have all the weapons and tools needed to fight and win your uphill nonjudicial battles. Don't forget our core values; Integrity, Service before self, and Excellence in all we do.

Excellence in all we do, and we do justice!



The Meaning of Teaming

by Chief Master Sergeant John P. Vassallo, USAF

Teaming—we've been hearing a lot about it lately. We hear about teaming with commanders and first sergeants, teaming with OSI, and teaming with security forces investigators. Most of all we hear about attorney-paralegal teaming. But teaming doesn't mean the same thing in each of those contexts, and that is especially true when it comes to attorney-paralegal teaming.

Today's concept of attorney-paralegal teaming really started before any of us were part of the JAG Corps. The first Special Assistant to TJAG for Legal Airman Affairs, CMSgt Swigonski, told General Cheney (then TJAG) that he wanted the paralegals to be "something more than just a bunch of typists and filing clerks"; he wanted them "to be a part of the legal team."[1] We've been very successful in many areas, especially in the increased quality of our training. But we can do more. Instead of concentrating solely on paralegal utilization, we've begun teaming — utilizing our attorneys and paralegals, both military and civilian, as true teams.

[1] CMSgt Swigonski's personally written letter on this subject can be found at https://aflsa.jag.af.mil/AF/PARALEGAL/LYNX/input_from_cmsgt_swigonski.doc

Teaming is about using our individual skill sets as attorneys and paralegals to create a legal effect that is greater than the sum of our individual efforts.

I'm a paralegal, not an attorney. I want to contribute my paralegals skills to the team, not learn to be an attorney. Teaming is about using our individual skill sets as attorneys and paralegals to create a legal effect that is greater than the sum of our individual efforts. Some may call this a synergistic effect, or 1 plus 1 equals 3. Whatever you call it, the point is that it's the use of different skills sets to achieve success. Teaming is using these complementary skill sets together to increase the effectiveness and the efficiency of how we provide legal capabilities to the command and to the war fighter.

Let's take a look at attorney-paralegal teaming using the four foundational paralegal skills: legal research, legal writing, interviewing, and discovery management.

Legal Research

Legal research and writing go hand-in-hand, so we should consider them together. We've come a long way in how and what we teach our paralegals in the area of legal research and writing. The JAG School Paralegal Apprentice Course (PAC) lays a solid foundation in this area by providing 20 hours of legal research instruction and 4 hours of legal writing. The Paralegal Craftsman Course (PCC) builds on that foundation by providing an additional 25 hours of legal research and 21 hours of legal writing instruction. Westlaw and the revived Legal Research and Writing Course provide additional training opportunities for paralegals. Yet even with such a good foundation, legal research and writing skills will fade if not used. When those skills fade, that carefully constructed foundation will crumble.

Paralegals have tried to build upon these skills for years by including research and writing in their set aside training. We would gather in the court room or conference room during these training sessions and teach each other how to improve our legal research and writing skills. Was this really practical? Who is it that truly benefits from these paralegal skills? Attorneys. So why aren't attorneys teaching paralegals how to develop their research and writing skills?

When paralegals return from PCC, or any training, they should meet with the attorneys they support and let them know how they were trained and what they learned. The attorneys, in turn, should show the paralegals how they can apply that training to help fulfill the section's mission. This accomplishes two things. The paralegal receives training from someone who has had extensive training themselves and, just as important, the trainer benefits by knowing what skills and abilities are available to him or her.

Of course, there will be a learning curve. Initially it will take longer for the paralegal to do the research and writing than if the attorney had done it himself. But as the paralegal's skills and the attorney's confidence in those skills improve, true attorney-paralegal teaming occurs. The paralegal independently researching and drafting legal documents for the attorney maximizes the effectiveness and the efficiency of the team.

Interviewing

Interviewing is the next area where attorney-paralegal teaming can reap benefits. We currently have a wealth of interviewing talent in the JAG Corps. Paralegals with experience investigating and settling household goods claims are skilled interviewers. In the past, on an almost daily basis, these paralegals walked into homes and interviewed upset (and often hostile) individuals pertaining to the circumstances surrounding damage to their property. Many times the person being interviewed acted as if the paralegal was responsible for their loss. In addition, these paralegals often informed claimants that their claims would not be paid. Both situations required "people" skills to be effective, i.e., the ability to talk effectively, build trust, and empathize correctly in a broad range of situations.

When responsibility for claims transferred to the carriers under USTRANSCOM oversight, paralegals lost the primary means of obtaining on-the-job training in interviewing skills. To counter this deficiency, improvements have been made in the training provided at both PAC and PCC, to include seeking assistance from the Federal Law Enforcement Training Center (FLETC) in developing a new interviewing curriculum. But as with research and writing, attorneys are the key to keeping paralegal interviewing skills honed so they don't atrophy from non-use. Although opportunities to use these interviewing skills in the claims are now limited, this skill set could be effectively utilized in other areas, such as in Military Justice.

How often do we see trial counsel sending out paralegals by themselves to perform witness interviews? This is a great area to consider one of the most important aspects of teaming: working independently, not together…apart from each other. How in the world is not working together teaming? Isn't teaming all about an attorney and paralegal working together to achieve the desired legal effect? Yes, but we don't always have to be physically together to be a great team. Teaming doesn't mean we have to hold each other's hand to work together. Some offices are "teaming" their attorney and paralegal

The training aspect of attorney-paralegal teaming doesn't just involve attorneys training paralegals. Paralegals have been overlooked as a training asset for attorneys, too.

by sending them out together to do all interviews. Is this efficient? Wouldn't it be more efficient and effective to send the paralegal out independently to conduct some of the interviews? The paralegal would probably be able to get more information interviewing his or her peers at the dorm or work center than the attorney would. Armed with this information, the attorney can decide to conduct a follow-up interview or proceed on the information obtained by the paralegal.

Discovery Management

Discovery management is the next foundational paralegal skill and it's probably the most exciting. This skill set spans all areas of practice, including military justice, labor and civil litigation. We have the opportunity to get in on the ground floor of this important skill and make attorney-paralegal teaming the standard. Teams can and should be used in all aspects of discovery management. Whether the skill is identification, collection, review, analysis, or production, done electronically or manually; now is the time to ensure we develop this practice as a team.

Conclusion

One final note on teaming, the training aspect of attorney-paralegal teaming doesn't just involve attorneys training paralegals. Paralegals have been overlooked as a training asset for attorneys, too. Historically the JAG Corps has followed the model of NCOs being developed as enlisted leaders and supervisors through both professional military education and practical experience. This model has not necessarily been followed on the attorney side. Rarely have we given our JAGs both the responsibility and tools to lead our enlisted personnel. This is changing. Attorneys will now be trained in enlisted development which is necessary for them to become better leaders and supervisors. Both the JAG School and, more importantly, legal office SNCOs will be responsible for training JAGs in the areas of enlisted promotions, assignments, evaluations and training, among other areas. This deliberate development of our JAG Corps officers will help provide them with the skills and knowledge to be fully capable Air Force leaders and supervisors. In turn, this will strengthen the bonds between attorneys and paralegals to create more highly effective teams.

Attorney-paralegal teaming isn't just a new policy, program or directive. It's a culture change that we need to embrace. The best part of this is that it's natural and easy. We've been doing it for years with great success. All we have to do is look at some of our smaller offices like those of our ADC, Guard and Reserve. Attorney-paralegal teaming has always been a necessity for them to accomplish their mission. CMSgt Swigonski saw it years ago: "Without the total cooperation, hard work, dedication, determination, and absolute loyalty of those at MAJCOM level, GCM level, and most particularly the Base level paralegals, anything that we tried would have been a complete failure."[2]

The time is past due. We have to bring the attorney-paralegal teaming model to the JAG Corps to ensure that we lead the Air Force in the effective and efficient use of our dwindling manpower resources.

[2] *Id.*


PIERCE

Attorney-Paralegal Teaming
WILL PREPARATION

by Captain Brant F. Whipple and Technical Sergeant Vilmarys Crossen, USAF

We've all heard the phrase "attorney-paralegal teaming" numerous times over the past year. Many of us have implemented this key pillar of Foundational Leadership in a number of different areas. One way we at the Yokota Air Base legal office have found particularly effective centers around attorney-paralegal teaming in the area of will preparation.

TRAINING

Today's paralegals are no longer just witnesses during will signings. They are actively involved in drafting standard wills and health care documents for legal assistance attorneys to review, approve, and use to advise clients. Effective training is essential to ensuring success in attorney-paralegal teaming, especially in the area of legal assistance. Fortunately, the JAG Corps created the perfect vehicle to support this initiative—the Will Preparation for Paralegals Course (WPPC), which is designed to prepare paralegals to draft wills for eligible legal assistance beneficiaries under the supervision of a licensed attorney. At our Staff Judge Advocate's direction, we immediately scheduled our three 7-level paralegals in the office to attend the course, and TSgt Vilmarys Crossen was the first to attend.

In December 2010, TSgt Crossen attended the first WPPC offered at the Air Force Judge Advocate General's School. The three-day course consisted of lectures and hands-on training. Paralegals were introduced to estate planning terminology and basic legal principles, and trained to navigate the DL Wills program to prepare standard wills and health care documents. Students also learned how minor children can impact the estate planning process, studied special estate planning considerations, and reviewed the proper procedures for conducting a will signing ceremony. Paralegals also discussed the purpose and applications of the AF Legal Assistance Website, and reinforced their understanding of the Rules of Professional Responsibility.

IMPLEMENTATION

Initial training was complete, but where did we go from here? How would our paralegals incorporate what they learned at the course into a well-organized construct involving the legal assistance attorney and client? The Yokota legal office had been producing wills for many years without using this "teaming" concept, so why fix what isn't broken? Well, there is always a better way when it comes to legal assistance, and there was definitely a more efficient way to produce wills. At Yokota, we were fortunate to have an experienced and supportive SJA. His advice, coupled with the input from the rest of the staff, led to the approach that we now use.

Before we could effectively team to produce an end product for the client, we needed to accomplish additional coordination and training within the office. While WPPC provided the foundation for drafting standard wills, how would we deal with more complex issues? Capt Sara Rathgeber, former Chief of Legal Assistance, along with SSgt Michael Gadlin, our second paralegal to attend the WPPC, provided additional hands-on training using DL Wills. During these training sessions, Capt Rathgeber demonstrated, using real-work examples, how the different options in DL Wills can be used to fashion a more personalized will focused on the client's particular needs.

Additionally, SSgt Gadlin shadowed Capt Rathgeber during several legal assistance appointments, which allowed him to learn the appropriate questions to ask based on the information in the will worksheet. This approach has helped our paralegals identify possible issues during the client intake process, and, when

appropriate, to reach out to clients in advance of their appointments to ensure their needs are accurately reflected in their draft wills.

THE PROCESS

The process at Yokota works like this: when the client calls to schedule a legal assistance appointment for a will or other health care document, our paralegals ask the client to complete the electronic will worksheet on the AF Legal Assistance website, and then to provide us with the worksheet tracking number. A paralegal is available to assist the client with creating or completing the worksheet if necessary. Paralegals check the office appointment calendar daily for will appointments and tracking numbers, retrieve completed worksheets, and begin drafting the requested documents using DL Wills. Draft wills with data files are saved in the office's secured shared drive under the client's name. The legal assistance attorney reviews the draft will prior to the client's scheduled appointment. When the client comes in for his or her appointment, all documents are drafted, printed, and ready for review. If corrections are required, DL Wills allows the attorney to pull up the previously-drafted document and change the answers.

In practice, this process has worked extremely well. It allows the attorney to spend the appointment time reviewing the contents of the documents with the client rather than having to draft the documents and review them during a single appointment. Attorneys can provide much more detailed information and advice to clients as well as change any substantive information in their documents during the scheduled appointment. This balanced approach has made appointments more productive for everyone involved.

RESOLVING ISSUES

What should you do when the will worksheet is incomplete or the client forgets to contact us with the ticket number generated from the Legal Assistance website? Be proactive and immediately follow up with the client. Paralegals can timely assist clients who omit data or are unsure of how to complete certain aspects of the worksheet. Explain the importance of having accurate, complete information and encourage the client gather the necessary information prior to the scheduled appointment.

What happens when the client requests a more complicated will, such as one involving a trust, guardianship issues in blended families, or divorced parents? Teaming is critical. Paralegals always have access to attorneys while drafting a will. Of course, the attorney bears ultimate responsibility to ensure each will complies with the applicable state law and is consistent with the client's instructions.

Teaming on will production produced valuable training moments for both judge advocates and paralegals. For example, while screening a client, the paralegal discovered that the named personal representative was a minor. The paralegal highlighted this issue on the will worksheet and the draft will, and discussed the issue with the responsible attorney. The attorney then discussed and resolved the issue during the appointment with the client.

Whether the issue is simple or complex, it is important to recognize training opportunities and include paralegals is the discussion. The attorney-paralegal team will then be better able to identify, research, and discuss potential courses of actions to meet the needs of the client.

SUMMARY

The initiative to have paralegals draft wills with attorney oversight epitomizes the concept of attorney-paralegal teaming. Paralegals have never been so invested in the legal assistance process as they are when drafting a client's last will and testament, and Airmen in the Yokota community know that the legal office paralegals are a trusted resource for legal assistance. Attorney-paralegal teaming is vital to improving the efficiency and quality of our services to our clients. Working together, the Yokota Legal Office is committed to accomplishing that goal.

1Lt Patrick J. Hughes and SSgt Michael D. Gadlin work together on a will for a client at the Yokota AB Legal Office.

JAG Corps Training:

In the Beginning . . .and Beyond

A description of the reasons for, and major components of, the emerging JAG Corps requirements-based training system.

by Mr. John J. Martinez, Jr.

In the beginning, there is the new JAG—or the civilian attorney who is just staring out in the JAG Corps—or the beginning paralegal, court reporter, or any of the other people who make up our Corps. We instinctively realize they will need training to get them up to speed. But how do we do that? What should we teach them? And, what's beyond initial training; how do we keep them up to speed? The JAG Corps has not had a comprehensive approach to addressing these questions. That is why, last year, The Judge Advocate General (TJAG) made training one of his four major foundational leadership initiatives.

He is not alone in emphasizing training. In his 4 July CSAF Vector 2011, the Air Force Chief of Staff explained that a "trained and ready" force is essential to making full use of Air Force capabilities. General Schwartz wants us to renew our focus on unit readiness. We are building a process to help do that.

Maintaining an effective training program is essential to developing, maintaining, and improving JAG Corps capabilities. A successful training program prepares people for both their current jobs and future responsibilities, keeps them current with changing laws and environments, and invigorates the force with timely information and fresh ideas. It is particularly important for our people because we often have to apply our knowledge and skills in urgent, high-stakes situations.

Maintaining an effective training program is essential to developing, maintaining, and improving JAG Corps capabilities.

It follows that training is one of every JAG Corps member's most important responsibilities—from TJAG to supervisors at all levels. It is an especially critical mission for staff judge advocates (SJA) and Law Office Superintendents (LOS) who must acclimate and inform those who are new to the JAG Corps.

Objectives

The overarching objectives for our training program involve answering two simple questions:

- What training do people need?
- How will the JAG Corps provide it to them?

Answering the first question requires identifying the elements of knowledge and specific skills (knowledge/skill requirements), people need to perform their duties. These can vary widely among individuals, but in general, they fall into two broad categories.

- ***"Task-based" knowledge/skill requirements*** are derived from individuals' current and projected duties. Ascertaining task-based knowledge/skill requirements involves answering two more questions:
  - What tasks do individuals need to perform?
  - What knowledge and skills do the individuals need to perform those tasks?
- ***"Career foundation" knowledge/skill requirements*** are those based on the knowledge and skills people need at various stages in their careers (e.g., grade level or time in service). These requirements often may overlap with task-based requirements. They differ in that career foundation requirements focus on which tasks individuals at certain levels need to be prepared to perform, regardless of their current or projected duties. In other words, "What every (captain)(major)(other) should know." Ascertaining career foundation knowledge/skill requirements involves answering this question:
  - What knowledge and skills do individuals need at various points in their careers?

Accomplishing the training program objectives requires defining what knowledge and skills JAG Corps members need. To do that it is helpful to place them within a conceptual framework that can later be filled in with specific, individually tailored knowledge/skill requirements. The foundational leadership construct provides a context for that framework.

JAG Corps Knowledge and Skill Areas

Our knowledge and skill areas fit neatly within the Foundational Leadership concept. Foundational Leadership starts with the understanding that people can't lead others until they can lead themselves. Thus, the base of the construct is made up of two important individual guideposts, the Air Force Core Values and the JAG Corps Guiding Principles. One step up from the base are talented, trained, and ready people. They internalize and apply the values and principles and, in turn, strive to master the JAG Corps Core Competencies.

Three of the core competencies focus on the basic elements of the legal practice:

- Legal Information Mastery
- Authoritative Counsel
- Compelling Advocacy and Litigation

The other three build upon the practice of law to encompass our legal services mission:

- Operational Readiness
- Fair Military Justice
- Robust Legal Programs

To master these core competencies, and to be able to lead and manage the people, offices, and organizations that provide the means by which we accomplish the mission, JAG Corps members develop their knowledge and skills in four major areas.

- **Professional Legal Knowledge.** Knowledge of the law and processes involved in JAG Corps fields of practice.
- **Legal Skill Sets.** Knowledge of the lawyering skills that attorneys and paralegals must maintain or be able to support (e.g., advocacy, client services, discovery management, interviewing, investigating, legal and factual research, legal writing, and litigation).
- **Universal Skills.** The skills required by all who (1) lead and work with people and (2) manage and use resources. These skills include communications, information technology, interpersonal skills, leadership,

mentoring, office management, and personnel development.

- **Professional Situational Awareness.** Knowledge that provides context on national security issues and on JAG Corps, unit, command, and Air Force history, missions, organizational structures, and perspectives.

These four areas are the framework; the details (specific knowledge/skill requirements), will be added through the operation of a requirements-based training system.

The Requirements-Based Training System

Maintaining a responsive requirements-based training system (RBTS) is essential to defining knowledge/skill requirements and then matching appropriate training to them. The RBTS defines, and then uses JAG Corps knowledge/skill requirements to determine the content of training, training media, the individuals selected for training, and the allocation of resources.

Because training content may become outdated when requirements change, the RBTS uses a structured feedback process to maintain currency. This process is called the training system feedback loop, which consists of a number of stages. No single office "owns" any of the stages entirely. Those involved range from everyone in the JAG Corps, to a few offices. These stages do not have distinct beginning or ending points and do not necessarily occur in a strict, linear series. In fact, they may often overlap. In addition, all the stages may be engaged at the same time as to different courses. That is because information as to one course or another will flow into the loop continuously and there will be constant interaction with students, supervisors, and training providers regarding requirements and course content. The loop has seven major stages:

Stage 1–Identify Knowledge/Skill Requirements.

Stage 2–Define, Design, and Develop Training.

Stage 3–Obtain and Allocate Resources.

Stage 4–Select Students.

Stage 5–Deliver Training.

Stage 6–Obtain Feedback and Reassess Requirements.

Stage 7–Evaluate and Validate Feedback.

Making the Requirements-Based Training System Work

A key feature of the RBTS is that everyone in the JAG Corps is directly involved in its operation. That is especially so regarding the identification of knowledge/skill requirements, which is the first stage of the training system feedback loop. The tool we will use for that is the Individual Training Plan.

Individual training plans (ITP)

ITPs will be the building blocks of the JAG Corps training system. TJAG has directed that everyone will have his or her own training plan. Supervisors will start by indentifying each person's current and projected knowledge/skill requirements and will determine what training is, or should be, available to fulfill those requirements. Then, in concert with each subordinate, supervisors will draft tailored plans, monitor each person's training progress, and update the plans at least once a year.

Fulfilling office knowledge/skill requirements through regular internal training sessions is an essential part of the JAG Corps training system. They can be a source of timely and relevant information, especially when topics include those identified as training needed by staff ITPs.

Topics will normally selected by the legal office based in part of staff knowledge/skill requirements that can be fulfilled by internal training. Upcoming events (e.g., high-visibility court-martial or air show), may provide ideas for topics. Offices with a number of personnel working in the specialized fields should participate in requesting, designing, presenting, or otherwise obtaining training that is particularly useful to them.

ITPs will include both task-based and career foundation knowledge/skill requirements. Paralegals will maintain ITPs also, but only as to training that is separate from their Career Field Education and Training Program (CFETP) requirements.

Training plans are not independent, isolated documents—they will have an impact that extends far beyond the individual. First, as training needs are compiled at legal office and higher levels, we will be better able to determine what is the Corps-wide demand for specific courses. The Judge Advocate General's School (AFJAGS) will receive specific information to use in determining resident course size and frequency. It will also use this information to prioritize the development and updating of eCourses. The ITPs will also help identify apparent gaps between the training needed and the training available, which in turn may spark changes to JAG Corps course offerings.

ITPs will provide an unprecedented opportunity to focus on the training needs of those working in specialized fields of practice. For the first time as a Corps, we will be calling upon people with extensive experience in particular fields to discuss with their supervisors what training they should have to continue to progress in their knowledge and skills. They will build upon, tailored, relevant training and will become more proficient as well.

Once there is a current ITP for everyone in an office, the Legal Office Training Plan can take shape.

Office Training Plans (OTP)

The OTP is an office-wide compilation of training needs data extracted from the ITPs of everyone in the office. They will share some format features with the ITP and will also be updated periodically. Office chiefs of training (or other designated individuals), will compile the plans, which will be approved by the SJA.

OTPs will prompt SJAs to consider and validate training needs; to seek, budget for, and obtain resources for appropriate training; and to inform MAJCOM chiefs of training when needed training is not available within the JAG Corps.

These consolidated lists will also help SJAs to nominate the right people for appropriate resident courses, direct them towards appropriate eCourses, cover needed knowledge and skills in internal office training, encourage self-study, and monitor the training progress of the entire staff.

OTPs will also provide a concise vehicle through which to communicate training requirements data, best practices, and lessons learned to MAJCOMs.

Higher Headquarters Consolidation and Analysis. MAJCOMs will receive training program information from the legal offices in their commands. MAJCOMs will analyze OTPs and other information to accomplish the following:

- Assess the effectiveness of legal office training programs (e.g., ITPs, OTPs, internal office training, planning and budgeting).
- Reassess JAG Corps tasks and associated knowledge/skill requirements.
- Determine how effectively available training fulfills JAG Corps knowledge/skill requirements.
- Gauge the MAJCOM cumulative demand for existing courses and resources and determine if any surpluses or deficits exist in availability, class sizes, or other factors.
- Validate the existence of apparent gaps between knowledge/skill requirements and existing training and resources to determine if any training is needed but not available. If so, they may prepare proposals for new or modified training.
- Identify best practices and lessons learned.
- Formulate observations and suggestions.

MAJCOMs will periodically provide the results of their analyses to AF/JA for the next stage of RBTS.

AF/JA Data Collection, Collaboration, and Assessment

AF/JA will serve as a central collection point for training requirements information and then distribute it to training providers and offices that support training. This is the point in the RBTS where

information is used to consider and make necessary modifications to the JAG Corps training program.

One major source of information will be from MAJCOM analyses mentioned above. Another is feedback from a variety of sources. Feedback may consist of information on course content, media (resident or distance), duration, scheduling, funding, availability, class size, student selection criteria, training materials, and overall value based on a cost-benefit analysis and other factors.

Valuable feedback may come from many sources including student course critiques, students' supervisors both immediately after training and at intervals thereafter, other direct observers of student performance (e.g., military judges, senior trial and defense counsel, and subject matter experts at Field Support Centers and elsewhere), Article 6 Inspection reports, self-inspections, after action reports, lessons learned reports, conferences, and information from surveys, focus groups, and studies.

As information is received, AF/JA will continuously collaborate with AFJAGS, other training providers, and training support offices. Working together, and with field legal offices, they will reassess JAG Corps tasks, applicable knowledge/skill requirements, and associated training.

This training team will be looking at the same things the MAJCOMs do during their consolidation and analysis phase, but this time for the entire JAG Corps. The key difference is that at AF/JA level, necessary changes can be implemented. For example, the content and scheduling of current courses can be modified. And, major gaps between knowledge/skill requirements and existing training and resources can be closed through the development of new resident or distance training. In addition, best practices, and lessons learned can be applied throughout the Corps.

This information will also be used to begin planning for an IT application that will significantly reduce the time required to enter, transmit, monitor, and analyze training requirements data. However, it will take time to reconcile this new requirement with the five programs that already maintain training data.

At the same time, we are developing a draft Air Force Instruction (likely first to be released as a Guidance Memorandum), that will describe the system and its components and processes.

Our overarching objective is to develop a system to apply training planning to the individual level, identify JAG Corps-wide knowledge and skill requirements, determine what training is necessary to fulfill them, and provide that training to those who need it, when they need it. The requirements-based training system concept will do that, and, every member of the JAG Corps will be directly involved in its development and day-to-day operation.

The Way Ahead

Many offices are currently using individual and office training plans to identify training needs and monitor progress. Many are also conducting regular internal training sessions. By the end of 2011, each JAG Corps member will have his or her own training plan. The next step is to go out to the MAJCOMs to gather information on their experiences and observations. One important objective is to determine the most effective format for training plans and implement a standard across the Corps. Another is to start gathering information on JAG Corps knowledge and skill requirements and associated training needs and thereby begin developing a process for transmitting information.

The New Certification Process

by Major T. Shane Heavener, USAF

Many of us were drawn to The Judge Advocate General's Corps by the promise of litigating courts-martial immediately upon entering active duty. It is no different with JAGs entering service today. But to litigate a court-martial without supervision by senior trial counsel, trial and defense counsel must be certified under Article 27(b) of the Uniform Code of Military Justice (UCMJ).[1] Only The Judge Advocate General (TJAG) may certify judge advocates as competent to perform the duties of trial and defense counsel in courts-martial.[2] Recently, TJAG revised the certification process.[3] This revision will most noticeably affect counsel currently attending the Judge Advocate Staff Officer Course (JASOC) 11C, graduating in September 2011.

Background

When a judge advocate is certified under Article 27, it means the judge advocate is qualified to serve alone as trial counsel for a General Court-Martial and qualified to serve alone as a defense counsel for a Special or General Court-Martial.[4] Certified counsel are also required at other proceedings, including: defense counsel for Article 32 Investigations;[5] counsel for courts of inquiry under Article 135;[6] counsel or hearing officer for depositions;[7] and legal advisor, military recorder, and respondent's counsel for officer discharge boards of inquiry.[8]

Before this revision, judge advocates were certified upon graduation from JASOC. In an article published this summer in TJAG's Online News Service, Brigadier General David C. Wesley, Staff Judge Advocate (SJA), Air Mobility Command, recalled his experience when he became a judge advocate in 1987 and had to try courts-martial before becoming certified.[9] General Wesley reminisced that "counsel were expected to participate in substantial ways…in at least three courts-martial before being nominated for certification by their SJA."[10] The revised process is similar in many respects to that process. Before awarding certification to a judge advocate, TJAG now requires more information about that judge advocate's demonstrated litigation skills. While excellent performance in the classroom environment of JASOC and in moot courts are indicators of competent litigation skills, real court-martial experience is the most reliable proof that certification is warranted.

New Qualifications and Considerations

To quality for certification, a judge advocate must meet these minimum qualifications: graduate from JASOC, demonstrate competence to perform the duties of trial and defense counsel, on some number of courts-martial, and be recommended for certification by the judge advocate's supervisory SJA and at least one military judge.[11]

In addition, before recommending certification, the supervisory SJA should consider the judge advocate's demonstrated competence in fundamental litigation skills and the judge advocate's overall officership demonstrated throughout those courts-martial experiences.[12] Most judge advocates should serve in at least three courts-martial to demonstrate competency.[13]

The SJA should also analyze the quality of the judge advocate's court-martial experience. SJAs should consider the counsel's fundamental trial skills demonstrated from case preparation through trial and sentencing; comprehension of fundamental

[1] 10 U.S.C. § 827 (1983).

[2] *Id.*

[3] AFI 51-103, Designation and Certification of Judge Advocates, (7 July 2011).

[4] Rules for Courts-Martial [R.C.M.] 502 (d)(1); *see also* AFI 51-201, Administration of Military Justice, para. 5.3.2. (21 Dec. 2007).

[5] R.C.M. 405 para. (d)(2); *see also* AFI 51-201 at para. 4.1.3.2.

[6] *Id*. at paras. 4.2.3. and 4.2.5.

[7] *Id*. at Figure 4.4.

[8] AFI 36-3206, Administrative Discharge Procedures for Commissioned Officers, paras. 7.7.1. and 7.7.2., and Attachment 13 (9 June 2004)

[9] TJAGC's Online News Service, lead article (1 June 2011), *available at* https://aflsa.jag.af.mil/FLITE/WebDocs/jag(JAG)/ONS/06_01_11.pdf or https://aflsa.jag.af.mil/AF/JAX/LYNX/ons_1_jun_11.pdf

[10] *Id*.

[11] AFI 51-103, Designation and Certification of Judge Advocates, (7 July 2011), para. 3.1.

[12] *Id*. at para. 3.2.

[13] *Id*. at para. 3.2.1.

military criminal law principles, procedures, and the Military Rules of Evidence; and demonstrated competence in any other litigation forums, including United States Magistrate's Court, administrative hearings and discharge boards, pretrial confinement hearings. In addition, the SJA should consider the counsel's performance in trial advocacy courses and workshops, such as JASOC, the Trial and Defense Advocacy Course (TDAC), Training by Reservists in Advocacy and Litigation Skills (TRIALS), among other programs.[14] SJAs should also assess the judge advocate's overall officership while preparing for and litigating those courts-martial, to include the ability to effectively team with paralegals and work effectively with civilian and military defense counsel.[15]

Is it possible to get enough courts-martial experience to meet the minimum qualifications? Earlier this year, HQ USAF/JAG gathered courts-martial data and specifically assessed the court-martial experience of our youngest JAG Corps members. According to this analysis, over 70% of new JAGs tried three or more courts-martial within their first three years.

TJAG's intent is for new judge advocates to obtain at least five years of experience at base-level legal offices, which they will draw upon for the rest of their careers. This means that most new judge advocates will initially serve in at least two base-level legal offices. SJAs must provide uncertified judge advocates opportunities to serve as trial or assistant trial counsel as well as opportunities to participate in litigation training (e.g., TDAC, TRIALS, etc.). The goal is to provide each new judge advocate with enough experience to qualify for certification within the first two assignments as a judge advocate.

For installations with few courts-martial, the SJA may need to send uncertified judge advocates to other installations to gain experience. Any TDY expenses associated with sending judge advocates to other bases for trial experience should normally be funded by their respective base legal offices. General Court-Martial Convening Authority (GCMCA) SJAs and the respective Major Command (MAJCOM) SJAs should assist the supervisory SJA with finding court-martial opportunities for uncertified judge advocates and, as needed, fund temporary duty (TDY) orders for these training opportunities. SJAs must continue to monitor and evaluate each judge advocate's progress toward becoming qualified to be certified.

While every effort should be made to certify active duty judge advocates within their first two assignments, there is no requirement that all judge advocates become certified.[16] If a judge advocate is not certified, the individual will not be qualified for certain assignments including: Area Defense Counsel, Senior Trial Counsel, Senior Defense Counsel, Appellate Counsel, or Military Judge.

While every effort should be made to certify active duty judge advocates within their first two assignments, there is no requirement that all judge advocates become certified.

Procedures

By the end of September 2011, judge advocates graduating from JASOC 11C will arrive at their assigned bases seeking litigation experience and hoping to soon become certified. The steps to assist in obtaining certification are listed below.

Step 1: The judge advocate must demonstrate to the supervisory SJA and a military judge that he or she should be recommended to TJAG for certification. Judge advocates must serve as counsel in at least three courts-martial and demonstrate an acceptable level of officership throughout.

Step 2: When satisfied that the judge advocate is qualified for certification, the supervisory SJA prepares a written recommendation describing how the judge advocate meets the minimum qualifications and lists the number of courts-martial on which the judge advocate served as trial counsel or assistant trial counsel.[17] The SJA's recommendation must attach a written recommendation from a military judge

[14] *Id*. at paras. 3.2.1.1.–3.2.1.5.

[15] *Id*. at para. 3.2.2.

[16] *Id*. at para. 3.3.

[17] *Id*. at para. 3.4.1.

who has observed the certification candidate in the courtroom.[18] The SJA may also attach any other matters that the SJA believes bears on the judge advocate's suitability for certification (e.g., training reports and written recommendations from senior trial counsel).[19]

Step 3: The supervisory SJA forwards the recommendations and additional matters to the GCMCA SJA with an information copy provided the respective MAJCOM SJA.[20]

Step 4: The supervisory SJA forwards the completed recommendation package with the GCMCA SJA's recommendation to the HQ USAF/JAX Accessions office.[21] Recommendation packages must be received by HQ USAF/JAX Accessions office no later than 1 January, 1 April, 1 July, and 1 October to be processed for each quarter.

Step 5: Each quarter, JAX compiles all certification recommendation packages and presents them to TJAG for consideration.[22]

Step 6: When TJAG determines that a recommended judge advocate is qualified and has demonstrated competence to perform the duties of trial and defense counsel in courts-martial, TJAG signs a certification order.

Step 7: JAX notifies the supervisory SJA of TJAG's decision and provides follow-up instructions, including requirements for administration of the one-time oath for newly certified trial counsel.[23]

Step 8: The supervisory SJA documents completion of the oath and forwards it to the JAX Accessions office.[24]

[18] *Id*. at para. 3.4.2.

[19] *Id.* at para. 3.4.3.

[20] *Id*. at para. 3.4.

[21] *Id*. Forward recommendation packages to afjax.workflow@pentagon.af.mil.

[22] *Id*. at para. 3.5.

[23] 10 U.S.C. § 842 (1983); *see also* AFI 51-201 para. 5.5.1.

[24] AFI 51-201, para. 5.5.1.1.2. Forward the original documentation to HQ USAF/JAX, 1500 W. Perimeter Road, Suite 3330, Joint Base Andrews, Maryland 20762.

Conclusion

Before recommending certification of a judge advocate, the supervisory SJA must understand the information TJAG requires about that judge advocate's demonstrated competence and litigation skills in actual courts-martial. The eight steps above should help supervisory SJAs provide TJAG with the necessary information and ensure the prompt certification qualified judge advocates.

References

For your convenience, the following references are available on TJAG's Federal Legal Information Through Electronics (TFLITE) under the JAX Accessions, Certification Folder, located at https://aflsa.jag.af.mil/AF/lynx/jax/index.php.

- AFI 51-103_ AFGM 1
- AFI 51-201_ AFGM 1
- Bullet Background Paper (BBP) Field Certification Program
- BBP Litigation Experience of Captains in the 2008-2010 CYGs
- Sample SJA Nomination Package to Certify JAG—(Step 2 above)
- Sample JAX Notification to SJA—(Step 7 above)
- Sample Oath Accomplished for forwarding to JAX upon completion—(Step 8 above)
- ONS 1 June 11, Trial and Defense Counsel Certification: Then and Now
- ONS 15 June 11, Litigation Experience of Young Judge Advocates and Who pays for court-martial experience?
- ONS 22 June 11, New Field Certification Process—Path to Certification
- ONS 29 June 11, What Happens After Certification is Complete

Developing Leaders:
A TAPESTRY FOR SUCCESS

Across the service, we represent a broad range of diverse missions, family situations, ethnicities, faiths, races and educational backgrounds. Yet, together, this rich tapestry forms the world's finest Air Force, drawn from the best talent that America has to offer.

— Michael B. Donley, Secretary of the Air Force

by Colonel Sharon A. Shaffer, USAF

I recently learned a valuable lesson in leadership. My team and I were working on an important office project when I realized I needed to augment the group with another member. As I sifted through the candidates, my natural tendencies had me leaning towards (and selecting) an officer who had a great performance record and who volunteered for every project in sight. There was another great candidate, however. She too had a great performance record, but she was not a particularly expressive or outgoing person. It wasn't until later as I reflected upon my decision I realized that I missed an opportunity that day in my responsibilities as a leader. The officer I didn't choose would probably have performed just as well as the officer I did select. In fact, I thought to myself, she probably has similar goals, like the officer I selected, to progress and ultimately become a leader in The Judge Advocate General's Corps. Perhaps all she needed was someone to draw her out of her shell, take a chance on her, and give her the opportunity to succeed.

Why is the scenario I described such a big deal? It's a big deal because it's about developing leaders. It's about investing in people from varying backgrounds, experiences and cultures and mentoring them for opportunities. It's about honing our interpersonal skills both as Air Force Airmen and as leaders to engender an inclusive environment that will attract and retain the best and brightest individuals to become tomorrow's leaders. It's about tapping into the strengths of *diversity* that all of us possess; it's about *inclusion*.

Many people think of diversity only in terms of equal opportunity. But equal opportunity does not begin to scratch the surface of what true diversity is. The Air Force defines diversity as "a composite of individual characteristics, experiences, and abilities consistent with the Air Force Core Values and the Air Force Mission…It includes, but is not limited to, personal life experiences, geographic background, socioeconomic background, cultural knowledge, educational background, work background, language abilities, physical abilities, philosophical/spiritual perspectives, age, race, ethnicity and gender."[1]

In October 2010, the Air Force published its Diversity Strategic Roadmap:

> Diversity is a military necessity and is every Air Force leader's responsibility. Air Force decision-making and operational capabili-

[1] AFPD 36-70, Diversity, 13 Oct. 2010, page 2.

> ties are enhanced by diversity among its Airmen, uniformed and civilian, helping make the Air Force more agile, innovative and effective. It opens the door to creative solutions to complex problems and provides our Air Force a competitive edge in air, space and cyberspace. Diversity includes and involves all of us. It is one of the strengths of the United States of America and gives the United States Air Force a decisive advantage as we engage globally.[2]

The National Defense Authorization Act for Fiscal Year 2009 established the Military Leadership Diversity Commission to conduct a comprehensive assessment of diversity practices and policies within the Department of Defense. After hosting numerous public hearings across the country, hearing testimony from key military leaders and subject matter experts, and interviewing a diverse group of servicemembers, the Commission drafted 20 recommendations for diversity leadership for the 21st century. Among them were recommendations for making respect for diversity a core value and for leadership training at all levels.[3]

In its Executive Summary to the President of the United States and Members of Congress, the Commission noted, "the diversity of our servicemembers is the unique strength of our military. Current and future challenges can be better met by broadening our understanding of diversity and by effectively leading our uniformed men and women in ways that fully leverage their differences."[4]

The Judge Advocate General has directed that the Corps will embrace a commitment to diversity for the 21st century. This year, we are partnering with key members of the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession to reach out and provide leadership training to our JAG Corps members. The training will focus on interpersonal and communication skills for fostering an environment of inclusion. As members of the world's finest Air Force, we owe it to ourselves to practice meaningful mentorship and view leadership through an "inclusive lens." By meaningful mentorship, we will focus on three "I's" of diversity: Inclusion, Investment, and Intervention.[5] Inclusion means integrating every member into the culture of a legal office. Investment entails giving all individuals opportunities to succeed and cultivating those who are not by nature enthusiastic or expressive. With intervention, meaningful mentorship includes not only helping individuals through obstacles by interceding on their behalf, but also giving honest feedback. Of course, meaningful mentorship goes both ways. Our training will also provide tools and techniques for individuals on how to seek mentorship opportunities and accept honest feedback.

Perhaps some of you are familiar with the scenario I described in my introduction. Maybe you can identify with the officer in her shell, who for, whatever reason, won't volunteer or get involved in her base community. Or perhaps you've had an experience similar to mine. The reality is that we can probably identify instances in our lives in which we either needed a leader to take a chance on us, or we just simply needed to engage others to take a chance on themselves.

So whatever happened to the officer I didn't select for that important office project? Well, I ultimately selected both. The lesson I learned that day taught me that diversity, and more importantly, inclusion, is vital to the success of our Corps and to finding creative solutions to the increasingly complex issues we face. It's important because it is about developing leaders. All of us come from different backgrounds, but as the Air Force Judge Advocate General recently noted, we come together to serve a greater purpose than ourselves.[6] As we weave together the values, cultures, characteristics and ethnic backgrounds that make each of us unique, and cultivate an environment of inclusion, investment, and intervention along the way, the end result is a valuable form of teaming of all of our talent, a tapestry for success, and the development of the leaders to meet tomorrow's challenges.

[2] United States Air Force Diversity Strategic Roadmap: A Journey to Excellence, Air Force Diversity Operations, AF/A1DV, 10/19/2010, http://www.af.mil/diversity.asp

[3] Military Leadership Diversity Commission, Final Report, 15 March 2011, http://mldc.whs.mil/

[4] *Id*.

[5] Mr. Joseph K. West, Associate General Counsel, Wal-Mart Corporation and Commissioner, American Bar Association Commission on Racial and Ethnic Diversity in the Profession

[6] TJAGC's Online News Service, Volume IX, Issue 18 (4 May 2011), *available at* https://aflsa.jag.af.mil/FLITE/WebDocs/jag%28JAG%29/ONS/05_04_11.pdf

How Do You Handle Military E-Mail?

TIPS TO SAVE TIME AND INCREASE PRODUCTIVITY

"Wondering exactly what your employees are doing all day? Well, at least half their time is spent on e-mail." -Inc. Magazine

by Major Greg J. Thompson, USAF

We arguably spend more time processing e-mail than we do on any other activity in a typical duty day. Yet rarely do we talk about how to work e-mail vs. having it work us. So I was surprised by the number of people in our legal office eager to share their thoughts and creative suggestions on how to get a handle on e-mail. Inspired by these great ideas, we created an office training opportunity. Our goal was to incorporate the best tips into a "gift of time" to a tasked office that does a lot with a little. If every person could save even 15 minutes each day through better e-mail management the resulting productivity would be profound. The results of our training are encouraging. Not only are we starting to use e-mail in a more effective manner, we are also more sensitive to the unique professionalism issues presented by military e-mail. These following suggested practices fall into two categories: Efficiency and Etiquette. While you may have a system that works well for you, consider how you can enhance your e-mail processing skills.

Efficiency

#1: Process e-mail at defined times each day. If you monitor e-mail constantly it is hard to get anything else done. How many times you should check your e-mail per day will depend on the pace of your office and the volume of e-mail received. For example, at our office, we now try to process e-mail three times per day: first thing in the morning, at lunchtime, and before leaving for the day. We allow thirty minutes per processing session. Of course, you will do what works best for your office and e-mail volume.

Another tip is to use Outlook rules to your advantage (see efficiency tip #4). Although I only process e-mail three times per day, I recognize there are people up the chain of command to whom I want to respond with speed if they e-mail me. To do this without monitoring my account all day long, I have installed a rule using Outlook rules. The rule plays a ringing sound whenever I get an e-mail from my boss, the Wing Commander, and a variety of other superiors up the chain of command and throughout the Wing. If any of these superiors e-mail me, my account, which is open in the background, will ring, and I am able to stop whatever I am doing and process their e-mail immediately. Otherwise, I process e-mail three times per day. This tip alone, when practiced with discipline, will save you substantial time each duty day.

#2: Eliminate e-mail folders. Without question, this tip received the most backlash from colleagues, so I offer it as an alternative way to process e-mail. Many will not be ready for such a paradigm shift from the old way of managing e-mail by folders. If you're like me, you have upwards of 100 folders where you file received e-mail. Over time, as the folder volume grows, you will experience difficulty finding a folder where you put an old e-mail. Did you file it by sender or by topic? Which topic did you put it in when it covered more than one topic?

Instead of engaging in *folder-mania*, I now use only one folder for received and processed e-mail. It is titled "Processed E-Mail." Before you disregard this as unworkable, consider the advantages. First, I have found it is much easier to find what I'm looking for, because I can search only one folder. I don't have to think at all about which folder the e-mail is in. With the search features available, I am able to search through all of my processed e-mail by date of e-mail, to or from, and even by a specific word. With the folder hunt abated, I have shaved more time off the e-mail kill chain. Another suggestion is to have two folders: "Done" and "Pending." This works essentially the same way. This suggestion is particularly important for those of us who receive significant daily e-mail volume and who want to keep track of e-mails that are not fully processed to action.

#3: Aim for in-box zero balance. Don't discount the power of this tip only because at first blush it seems impossible. Here, achievement is not as important as effort and the goal itself. The problem that this goal addresses is that e-mail can shift from a tool, to a burden, to overwhelming, in several days without proper management. When that happens, e-mail can independently become a major stressor to your day and have a significant impact on productivity. Therefore, I suggest processing all e-mail into a "Processed" and/or "Pending" mail folder, or some other system of folders to acknowledge the e-mail has been addressed or at least pending resolution. The goal is to touch e-mail only once by moving e-mail out of the in-box and into the processed or pending action category.

To process mail efficiently to reach zero balance, you should take affirmative action on every e-mail as you process them throughout the day. Five possible actions follow. Be decisive.

- DO
- DELEGATE
- DEFER
- DELETE
- FILE

If you make effort to get to zero balance, you may approach total e-mail tranquility. Enjoy it…at least until the next message comes in.

#4: Leverage Outlook rules and alerts. Microsoft Outlook has a tool called *rules and alerts*. If you haven't yet used these, they are tools of efficiency. I discussed how I am able to check my e-mail account three times per day without continuously monitoring it under efficiency tip #1. I also employ an outlook rule wherein if I receive e-mail from our Numbered Air Force, Wing Commander's Office, or Staff Judge Advocate, an audible noise will sound, and the e-mail will be highlighted and bolded. When I am not actively processing e-mail, my Outlook account is running in the background and will alert me to these high priority e-mails. This allows a timely response to those superiors without bogging down my work flow efficiency for the day.

There are a variety of other rules and alerts that can be set. One I find helpful is a rule where all e-mails where I am in the *Cc* line only, go into a designated *Cc* folder for my review. Since I am only Cc'd in those e-mails, I do not treat them with the higher priority denoted to those e-mails where I am the addressee in the *To* line. You might also consider a rule to include all the names of the base personnel who send base-wide e-mail information about picnics, luncheons, and promotions to go directly to a lower priority folder.

#5: Use keyboard shortcuts. It is faster to process e-mail using keyboard shortcuts. They are easy to use and over time much more efficient than using the mouse and click method, especially when e-mail volume is high. Some examples are:

- Ctrl + D = Delete
- Ctrl + F = Forward
- Ctrl + R = Reply
- Ctrl + N = Create a new e-mail
- Alt + S = Send

Etiquette

Our second category of e-mail tips is etiquette. Or, as the *Tongue and Quill* terms it, "netiquette."[1] The discussion on this topic could be exhaustive, but the following are a few our office identified as often misused or abused.

#1: Know the difference between To and Cc. People in the *To* line are the directly intended recipients of the e-mail and are called to action. People in the *Cc* line are not. Those in the *Cc* line are there for their information only and are not called to action. A second lesson is that a superior officer is only in the *To* line when the superior officer needs to do something, and where that request is appropriate based on customs and courtesies. More often, superiors in one's own office are in the *Cc* line for their awareness only. This respects their position and grade and does not put a junior officer in the position of telling a superior what to do. Professional respect can be shown through placing a superior in the *Cc* line when appropriate.

#2: Respond to e-mail taskers twice and in a timely manner. Often we get e-mail taskers from superiors. There are two ways to handle this. One is to do the work requested and respond with the answer when the tasker is completed. The other is to respond immediately that you have received the tasking e-mail and are working the issue, and then respond with the answer when the task is completed. The latter is preferred. Generally, a superior wants to know you understand the tasking and are working it. A non-response leaves a superior to wonder if you received the e-mail, are working on it, and if you have given the tasking the proper priority it

[1] AFH 33-337, *The Tongue and Quill*, 30 June 1997 at 184.

deserves. Silence is not endearing to the superior's confidence that the work is going to be completed on time. Where possible, always respond twice to e-mail taskers—once acknowledging the tasker, and a second time with the answer and response to the completed tasker.

#3: The Do's. Here's a list of our favorite things to DO….

- Order names by grade and rank, in the *To* and the *Cc* lines.
- Use a signature block with your contact information.
- Proofread and spell check before sending.
- Use read receipts sparingly. Nobody wants to be spied on.
- If your superiors are using a Blackberry or smart phone to read e-mail, keep your message as brief and compact as possible to limit their need to scroll. Cut and paste attachments as it may be difficult to open them on a portable device.
- Use proper customs and courtesies in your e-mail.
- Very respectfully or V/r to superiors
- Sir or Ma'am to superiors. If you are sending to multiple recipients

#4: The Don'ts. This is a non-exhaustive list of the things in e-mail that makes us cringe. So please DON'T….

- Excessively use the Cc line. Don't spam the office just because you can.
- Forward e-mails where the sender had no reasonable expectation their e-mail would be forwarded.
- E-mail when angry.
- Criticize in your e-mail.
- Use Bcc excessively.
- E-mail when a phone call or in person visit is better.
- *Reply to All* except in very very limited situations where even a colleague agrees it is advisable.
- Copy up to apply coercion. Don't copy someone of higher grade in your office to leverage the correspondence unless warranted.
- Overuse exclamation points.
- Use ALL CAPS. We don't want to be screamed at using e-mail.
- Write in color.
- Overuse the high priority flag.
- Send an e-mail outside of the chain-of-command or to higher headquarters without SJA authority, and even then, don't send the e-mail without Ccing the office supervisor.
- Send an e-mail with anything in it you couldn't defend on the front page of the newspaper.

Conclusion

In conclusion, I would like to thank the men and women of the 355th Fighter Wing legal office at Davis-Monthan AFB for their help in creating these tips. Our hope is that this article will give some practical and helpful ideas to make your work day more efficient, or at least challenge you to think about e-mail efficiency and how to be more productive every day.

COMMUNITY LEGAL SERVICES:
A New Era in Legal Assistance and Preventive Law

by Mr. Jeffrey A. Middleton

There are myriad ways in which we, as legal professionals, can serve our local military community. One of the most important ways we do so is through the JAG Corps Legal Assistance and Preventive Law Programs. These programs provide peace of mind to fellow Airmen and their families; serve as a key morale and retention tool; help contribute to the overall sense of community at the installation level; and, most importantly, help people resolve legal matters.

AFLOA/JACA

In July 2011, the JAG Corps stood-up the Community Legal Services Division (AFLOA/JACA) to better focus on the legal assistance issues that weigh on the minds of Airmen and their families and that materially affect our military communities. Their focus will be two-fold: first, administer the Air Force Legal Assistance and Preventive Law Programs; second, manage JAG Corps capabilities to effectively provide the military community (including com-

manders) with information on common Air Force community matters.

JACA will take the lead in establishing policies and implementing measures for the JAG Corps' delivery of legal assistance to our clients. Although it will not technically be a field support center, JACA will provide guidance on policy matters such as the appropriate roles of attorneys, paralegals, and support staff (active duty and ARC) in our legal assistance processes. They will, for example, continue to champion our utilization of paralegals in the wills process. JACA will also help the JAG Corps become more proficient in emerging areas of the law where more and more clients are experiencing a need. For example, it will begin a concerted effort to emphasize to legal assistance attorneys and paralegals Exceptional Family Member Program issues and how best to assist clients in this emerging are of the law.

JACA will help to establish links between legal offices and key personnel on their installation.

Additionally, the Community Legal Services Division will continue to make improvements to the legal assistance website and use WebLIONS data to analyze workload and client demographics, how legal assistance requirements relate to JAG Corps manning at the installation level, identify best practices, and suggest adjustments. They will look for resources which can better assist JAG Corps personnel and work with headquarters for projects requiring large budgets. Another major project will be to monitor and improve JAG Corps developmental education related to legal assistance (e.g., at courses hosted by The Judge Advocate General's School, on CAPSIL, through webcasts, etc.).

JACA will also represent the JAG Corps to the American Bar Association, state bars, and pro bono clinics with regard to legal assistance matters. Additionally, they will partner with SAF/LL on legislative issues related to legal assistance. JACA will also work with the other service's legal assistance divisions and with DoD to find joint solutions for service members.

As part of a new and robust Preventive Law Program, JACA will assist with and provide information on matters that materially affect the military community as a whole. Their goal will be to ensure that attorneys and paralegals at each base office are aware of, and can provide detailed information to commanders and their base population for community matters (not under the auspices of the Legal Assistance Program). JACA will help to establish links between legal offices and key personnel on their installation. For example, while a certain type of issue with a local school may not be appropriate for establishment of an attorney-client relationship, it may be extremely valuable to provide the name and email address for your local School Liaison Officer. Another important example is, in partnership with AF/JAA, providing information to assist commanders and other community members with issues related to privatized housing.

The Community Legal Services Division will provide valuable support to help base legal offices ensure the success of the JAG Corps Legal Assistance and Preventive Law Programs. Through training and enhanced resources, attorneys and paralegals can look forward to becoming more proficient in this critical area of our practice and in continuing to make a major impact on our communities.

Questions?

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Year of the SCRA

How important legal protections for services members are being expanded and enforced by the courts and Congress

by Major Scott A. Hodges, USAF

Whether or not you regularly provide legal assistance as a JAG Corps member, you likely have noticed that the Servicemembers Civil Relief Act (SCRA) is a hot topic. This year began with renewed interest in a SCRA case fought by one of our own, Colonel John Odom (USAFR retired), followed by hard-hitting Congressional hearings on Capitol Hill, and finally, the announcement of big settlements by the U.S. Department of Justice affecting thousands of military members. Digging deeper behind the headlines, we can refresh ourselves on key legal assistance concepts while also studying the impact of these important current events.

The SCRA is a core area of our legal assistance practice. It provides a series of robust legal rights for service members under federal law.[1] Recent changes to the SCRA have significantly broadened its protections. The 2009 Military Spouses Residency Relief Act expanded the income tax shield for military pay of non-domiciliary military members, to income earned by spouses who meet certain criteria.[2] Legislative changes at the end of 2010 also added teeth to the SCRA—including a possible civil penalty of $55,000 for a first time offense, and the explicit possibility of a private cause of action for damages and attorney's fees. Further, these amendments closed loopholes by strengthening the cell phone service termination right, and including an explicit prohibition on early termination fees for residential leases.[3] But what

[1] The federal nature of the SCRA allows judge advocates to build up expertise over time, and we can, should, and by default often do, possess a better understanding of the SCRA than our civil practitioner counterparts in the civilian bar.

[2] All income of the dependent spouse is shielded from taxation by the non-domicile state where he or she is located if the spouse has legitimately established and maintained a domicile which is not where he or she is presently located, and he or she is in the present location with the military spouse due to military orders, and the domicile of the military member and the spouse are the same. 50 U.S.C. App. § 571. Although the third requirement (same domicile) is explicitly stated in the statutory language, many states do not in fact require it.

[3] Section 597 gives the U.S. Attorney General enforcement authority and provides for a civil penalty of $55,000 for a first offense, and $110,000 for subsequent offenses. Section 597a lays out the private cause of action, to include attorney's fees and all other appropriate relief. The right to terminate cell phone service contracts in § 535a was greatly clarified and improved. Whereas § 535 previously only explicitly prohibited early termination fees on vehicle leases, it now provides the same protection for residential leases.

has attracted the most attention from the press and Congress in the first half of this year are the older SCRA protections—specifically, those regarding pre-service mortgages and the six percent interest rate cap on pre-service debt.

A case in point, that of Sergeant James Hurley, arose in 2008 as the housing market took a nosedive and foreclosures spiked dramatically.[4] SGT Hurley was an Army National Guardsman who deployed to Iraq in 2004 for over a year. During his deployment his home was foreclosed upon without a court order and sold to another party. The bank was even notified of the fact that Hurley was deployed to Iraq before they completed the foreclosure. After SGT Hurley returned from Iraq, he found his wife and children evicted from their dream home, which had already been resold to a new owner. With no way to recover his house, the Soldier began a long legal battle to seek restitution.

Colonel Odom, a retired Air Force judge advocate practicing law in Shreveport, Louisiana was asked to help SGT Hurley after a Federal District Court in Michigan ruled that SGT Hurley did not have a private cause of action to sue under the SCRA. Colonel Odom was intimately familiar with this issue—in fact the District Court relied on precedent from a previous case out of the Northern District of Texas that he had litigated.[5] Unfortunately, the Michigan court relied on the wrong version of the Texas federal court's case because Colonel Odom had convinced the court to reverse itself.

So Colonel Odom stepped into the fray and became lead counsel for SGT Hurley. The District Court in Michigan was reluctant to admit its mistake, but finally in 2009, he won the day and the court reversed itself on the private cause of action issue. The Hurley case and Colonel Odom's prior experience in military legal assistance gave him the ammunition to lobby Congress for an explicit legislative right to sue under the SCRA, a battle he eventually won with the aforementioned SCRA amendment in December 2010.

Exactly what rights did the banks violate when they took SGT Hurley's home? SCRA (50 USC Appx.) Section 533 was part of the Act when it passed in 2003, although Congress expanded the protection in 2008. Section 533 applies to mortgages acquired prior to military service, meaning either before a person enters onto active duty or, in the case of Guardsmen or Reservists, before a period of activation. This section provides protection for servicemembers with pre-service mortgages in three ways: It prohibits foreclosure or seizure without a court order, it provides the servicemember a right to a stay of proceedings, and provides the court authority to adjust the servicemember's obligation. The 2008 modifications to the SCRA extended this shield for servicemembers to the nine months following active duty service.

Additionally, SCRA (50 USC Appx.) § 527 provides that upon request of a service member the interest rate on any pre-service debt shall be reduced to a maximum of six percent, any interest over that amount is forgiven, and the reduction is retroactive to the time of activation. This protection applies to any interest bearing obligation, but for mortgage loans the interest rate cap extends for one year beyond active duty service. For protection under Sections 527 and 533 the service member's military service must materially affect their ability to meet the financial obligation.

[4] Adam Hochberg, *Lenders, Service Members Clash Over Law*, Nat'l Pub. Radio (Aug. 18, 2008).

[5] The original decision was Batie v. Subway Real Estate Corp., 2008 WL 413627 (N.D. Tex. Feb. 15, 2008) (No. 307-CV-1415-M) (Batie I). The Judge granted reconsideration and vacated *Batie I* with the following decision, Batie v. Subway Real Estate Corp., 2008 WL 5136636 (N.D.Tex. Mar. 12, 2008) (No. 307-CV-1415-M) (Batie II).

After Colonel Odom won the private cause of action issue, the bank didn't stop fighting. *The New York Times* and other press outlets picked up the story again this year.[6] Still, the defendants did not make a serious settlement offer. Then another big SCRA story hit the press, the case of Marine Corps Captain Jonathan Rowles. Although JP Morgan Chase had lawfully reduced the interest rate on the Rowles' pre-service mortgage interest rate to six percent, their system continually reset the interest rate to the higher contractual rate while Captain Rowles was deployed to Iraq. Then the bank took debt collection actions against Mrs. Rowles. Ultimately, it was uncovered that JP Morgan Chase had been resetting the interest rate for not just hundreds, but thousands of service members.[7] JP Morgan Chase & Co. agreed to pay $12 million to members of a class-action suit, set aside $15 million for future damages, and also implemented roughly $27 million in benefits for its military customers

As legal assistance practitioners, we need to understand how and why the SCRA is changing, and be prepared to discuss its protections with our clients.

In response to the Hurley and Rowles cases, the House Veteran's Affairs Committee held hearings in February to look into SCRA abuses by the banking industry. Colonel Odom testified, as well as the counsel for Rowles. When the bank executives testified, the exchange was much less cordial. The senior ranking member of the Committee asked the JP Morgan Chase executive how many of their senior executives should be going to jail. Congressional disproval of similar practices in the banking world added fuel to the fire under Deutsche Bank and Saxon Mortgage Services, Inc., but one additional matter would come to bear before they settled with SGT Hurley. In the midst of the March 2011 trial, Colonel Odom served them with a subpoena that sought to disclose to the court a Justice Department investigation into Saxon Mortgage. The defendants finally made a settlement with the Hurley family, for an undisclosed amount.

The Justice Department investigation that resulted from Colonel Odom's pursuit of SGT Hurley's case, as well as referrals from other military legal assistance attorneys, splashed into the news at the end of May. Bank of America settled with the class of defendants represented by Justice for $20 million, and Morgan Stanley, which owns Saxon Mortgage Services, Inc., settled for $2.35 million. Colonel Odom estimates that more SCRA damages were paid in the first half of 2011 than in the history of the SCRA.

2011 certainly has been the year of the SCRA, as Congress continues to introduce new legislation to strengthen the law even more, such as doubling civil penalties, increasing the criminal penalty to a felony, and extending the post-service periods of time for foreclosure protection. These recent cases and news events are important because commanders and first sergeants expect us to be conversant on legal topics in the media. But more importantly, as legal assistance practitioners, we need to understand how and why the SCRA is changing, and be prepared to discuss its protections with our clients.[8]

During his testimony before Congress, Colonel Odom reminded us of our obligation as legal assistance professionals: "When our National Guardsmen and Reservists get their mobilization orders, they have to know that 'someone has their Six' as we say in the Air Force. They have to know that if something goes wrong while they are off fighting for their country, when they come home someone can seek to straighten things out and if it takes a lawsuit to do it, they will have the right to go to court and seek damages if their rights under the SCRA have been violated."[9]

[6] *See, e.g.*, Diana B. Henriques, *U.S. Inquiry on Military Family Foreclosures*, N.Y. Times, Mar. 12, 2011, at B1.

[7] Kerri Panchuk, *JPMorgan Chase settles military mortgage dispute for about $54 million*, HousingWire (22 Apr. 2011), *available at* http://www.housingwire.com/2011/04/22/jpmorgan-chase-settles-military-mortgage-dispute-for-about-54-million

[8] Colonel Odom went to the effort of combining all of the current SCRA provisions, up through the December 2010 modifications, into a single PDF document that is available in the SCRA learning center on CAPSIL and on the Air Force Legal Assistance Website, https://aflegalassistance.law.af.mil. His SCRA benchbook, which provides case law and analysis of the SCRA provisions, is now available for purchase on the ABA website at http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=4210001

[9] Statement of John S. Odom, Jr., House Committee on Veterans' Affairs, Subcommittee Hearing on H.R. 2696, September 23, 2009.

Caring for Wounded Warriors

An Introduction to the Air Force Disability Evaluation System

by Mr. Rick A. Becker

In the last decade, two wars and numerous contingency operations have led to a large increase in the number of military members becoming wounded, ill or injured. During this same time, advances in medical science have led to more wounded warriors surviving injuries that just twenty years ago would have been fatal. Military rehabilitative care has also dramatically improved allowing for many wounded to fully recover and return to duty. However, many of those wounded will not fully recover and will end up living with significant disabilities for the remainder of their lives, with those disabilities often leading to their medical removal from further duty.

The Air Force (AF) Disability Evaluation System (DES) is charged with deciding who can remain on duty and who must be medically separated or retired. Everyone knows that military members can be 'medically boarded', but most have only a vague idea of how military disability evaluation systems really work with many thinking it is like what was presented in the Robert De Niro and Cuba Gooding, Jr. movie, *Men of Honor*. What follows is an overview of the Air Force's system for evaluating wounded warriors for return to duty or medical separation.[1]

[1] This article is limited to active duty members—there are multiple differences in Air Guard and Reserve cases. AF Academy cadets historically were not eligible for evaluation in the AF DES, but they were included starting in October 2004, but they also have some differences not covered in this article. *See* 10 USC §1217.

Overview

The Air Force DES is a personnel process administered by the Air Force Personnel Council under the direct authority of the Secretary of the Air Force.[2] Chapter 61, 10 United States Code provides military Service Secretaries with authority to retire or discharge service members found medically unfit to perform the duties of their office, grade, rank or rating and the determination may include whether the medical condition represents a decided medical risk to the health of the member or to the welfare of other members or imposes unreasonable requirements on the military to maintain or protect the member.[3]

[2] *See* AFI 36-2023, The Air Force Personnel Council and the Air Force Personnel Board (8 Mar 2007)[hereinafter AFI 36-2023].

[3] The legal authorities for the AF DES are governing law, implementing publications, policies and procedures to include: 10, U.S.C. § § 1201-1222 (2010); DoDD 1332.18, Separation or Retirement for Physical Disability (4 Nov. 1996); DoDI 1332.38, Physical Disability Evaluation (14 Nov. 1996); DoDD 1332.41 Boards for Correction of Military Records (BCMRS) and Discharge Review Boards (DRBs)(8 Mar. 2004); DoDI 1332.28 Discharge Review Board (DRB) Procedures and Standards (4 Apr. 2004); Department of Defense Directive Type Memoranda (DTM) of which there are several and which can be located by dates of issue. The main ones include: (29 Mar. 2010); (6 Jan. 2009); (11 Dec. 2008); (21 Nov. 2007); (14 Oct. 2008); (13 Mar. 2008); (19 Dec. 2007); and (3 May 2007); (27 Mar. 2006); Dep't of Veterans Affairs, *Department of Veterans Affairs Schedule for Rating Disabilities*, 38 CFR Part 4, [hereinafter VASRD]. (This includes VA departmental interpretations and those by the U.S. Court of Appeals for Veterans Claims. *See* DoDI 1332.32, Encl. 7.); AFI 36-3212, Physical Evaluation for Retention, Retirement, and Separation [Change 2](27 Nov. 2009); AFI 41-210, Patient Administration Functions (22 Mar. 2006); AFI 36-2910, Line Of Duty (Misconduct) Determination, [Change 2](5 Apr. 2010); AFI 48-123, Medical Examinations and Standards [Change 1](1 Jun. 2010); and HQ AFPC Procedure Memoranda which includes: Numbers 1- 10, Chief, USAF Physical Disability Division, HQ AFPC/DPS, Hearing Schedules and Cases; Client Privacy Civilian Counsel, Board Challenges, Objections, Hearing Delays/ Continuances, Hearing Observers ,Processing of Boards Pertaining to Members with Over

Entrance and Fitness Evaluation

Airmen are entered into the DES by "referral" whenever there is reason to believe they cannot do their job or their condition(s) could endanger or degrade the mission. Referrals are done when a competent medical authority (usually the person's attending physician) determines an Airman has one or more conditions which are suspected of not meeting medical retention standards. The process starts at hospitalization or treatment when the person's progress appears to have medically stabilized, the expected course of care and recovery are relatively predictable, and when it can be reasonably determined they most likely will not be capable of performing their job within a year.

The referring physician is required to conduct a full examination, prepare documents necessary to identify the potentially disqualifying medical conditions (called a Medical Narrative Summary or NARSUM) and refer the case to a medical evaluation board (MEB) at the military medical facility. NARSUM usually contain an informal line of duty (LOD) determination because line of duty is presumed except in cases with questionable issues where a formal report must be done. Examples of "questionable" issues include: injury/disease occurring under strange or doubtful circumstances, due to intentional misconduct or willful negligence (e.g., motor vehicle accidents), involving abuse of alcohol/drugs; self-inflicted wounds/injury or disease occurring during a period of unauthorized absence.

Medical Evaluation Board (MEB): Once in the DES, the individual will have their condition(s) evaluated by a medical evaluation board (MEB) which usually consists of three physicians from the individual's military medical treatment facility. In psychiatric cases, one member must be a psychiatrist. The MEB determines if any potentially unfitting medical conditions exist using retention standards, (found in AFI 48-123) the NARSUM, and performance information from their command. If the MEB finds all medical conditions meet standards, then they will recommend return to duty. If any of the conditions do not meet standards, then the MEB refers the case for fitness for duty consideration by a physical evaluation board (PEB).

Eight Years of Active Service and Presumption of Fitness *seriatim* (July 2010).

Impartial Physician Review: To help evaluees understand their cases, they have a new right provided for in the National Defense Authorization Act of 2008 (NDAA 2008) to request that an impartial physician review their case and provide advice on whether the findings of the MEB adequately reflect the complete spectrum of injuries and illness considered by the MEB. After discussing their case with their impartial physician, the evaluee is allowed to request a rebuttal of the MEB information/results in order to point out information believed to be incorrect or inadequate. The rebuttal is sent to the convening medical authority who can decide to have the MEB address issues raised and perhaps change an unfit determination to fit, or to finalize the MEB and send it to the PEB for further review.

Physical Evaluation Boards (PEB): Where a MEB finds potential unfitness issues, the case is sent to PEBs who are fact-finding administrative boards that "investigate the nature, origin, degree of impairment, and probable permanence of the physical or mental defect or condition of any member whose case it evaluates."[4] PEBs provide the full and fair hearing required by 10 U.S.C. §1214 for those being considered for disability retirement or separation. The AF has an Informal and a Formal PEB. The Informal PEB is a limited records review board. They do not review the person's complete medical records and do not allow a personal appearance by the evaluee or counsel. Unlike the IPEB, the Formal PEB (FPEB) provides a full record review and allows the evaluee the option to appear before the Board, introduce evidence, and testify in person.[5]

PEBs must contain three members and each Military Department determines their exact composition. Generally they consist of a president, a field grade personnel officer or civilian equivalent, and a senior medical officer. PEBs address four issues:

- Is the Airman fit for duty?
- If unfit for duty, are the Airman's unfitting conditions compensable?

[4] AFI 36-3212, para. 3.1, *Purpose of PEBs*.

[5] DoDI 1332.38, para. E3.P1.3.3.5, *Hearing Rights*, provides a complete list of all rights an evaluee has at the FPEB. FPEB hearings are *de novo* reviews and neither military nor federal rules of evidence are applied. The only standard for evidence introduction is that it be relevant and material to the Airman's case. They are expected to be done in a non-adversarial manner. AFI 36-3212, para. 3.38, *Purpose of the Formal Hearing*.

- If the conditions are compensable, what percentage rating should they receive?
- Are any of the Airman's unfitting conditions combat-related or caused by an instrumentality of war?

Just because an individual has a medical condition that is listed in the AF's medical standards or the VA's Schedule for Rating Disabilities (VASRD) does not mean the person is automatically unfit for further military service.

Fitness for Duty

Just because an individual has a medical condition that is listed in the AF's medical standards or the VA's Schedule for Rating Disabilities (VASRD) does not mean the person is automatically unfit for further military service. PEBs make fitness determinations based on all relevant evidence presented. This normally consists of information on duty performance, their medical condition(s) and how the condition affects (and may in the future affect) the person's ability to fully meet the obligations of both their specific job requirements and the general requirements for being a physically fit military member in a post 9-11 world.[6] An important change in fitness determinations is the change from the rule that boards could not find someone unfit for service solely based on an inability to perform duties in every geographic location and under every conceivable circumstance to being allowed to put someone out solely because they cannot be sent anywhere at any time.[7]

Fit for duty: Members found fit by an IPEB may request a formal hearing to contest the finding. If the request is denied, the case is finalized by the Secretary of the Air Force designee at HQ AFPC/DP and the person is returned to duty. If the review is granted, the person appears before the Formal PEB in the same manner as in any other case. It should be noted that just because the person is returned to duty does not mean they will not face possible physical restrictions which are set forth in a physical profile or description of duty limitations. MEB/PEBs do not determine profile or duty restrictions.

A widely misunderstood issue is the idea that a MEB or PEB can order "medical cross training" to allow someone who can no longer do their particular job to cross train into a physically less demanding one. MEB/PEBs have never had this ability. No one in the DES can direct cross training; it is the unit commander's responsibility. Another misunderstanding is the idea that a board can return someone to duty for continued observation and care to delay a decision. Boards are not even permitted to use phrases such as "continued medical observation and care," or "refer to another hospital for evaluation," because they imply the member was not ready to board or the facility was unqualified to conduct the board.[8]

Unfit for duty: Members found unfit by a PEB are required to have their case looked at by the board to determine if the unfitting condition(s) is (are) compensable. If found not compensable, the person will be medically discharged without entitlement to disability benefits.

Presumption of Fitness

In certain instances, known as the "presumptive period," Airmen enter the DES under a rebuttable presumption that they are fit for duty. This is known as the Presumption of Fitness Rule. The presumptive period includes the time when the narrative summary is prepared after one to the following instances:

- After a request for length of service retirement has been approved

[6] Post 9-11 there has been increased emphasis on individuals being able to meet requirements commonly expected of "first responders" since terrorism can occur anywhere and anytime. In the past, an argument could be made that if someone was not worldwide deployable, then just keep them CONUS and for example place them in a Pentagon cubicle desk job. Of course, 9-11 showed there is no such thing as a "safe" place and all AF members are expected to be able to respond robustly to attacks, e.g., run away from explosions, return to assist those hurt or buried in rubble and carry them to safety, etc.

[7] DoDI 1332, para. E3.P3.4.1.3 states full worldwide deployability "will not be the sole basis for a finding of unfitness," but DTM, 19 Dec 07 says military departments may in fact now do just that.

[8] AFI 41-210, para. 10.7.3.2.

- An officer has had selective early retirement approved or an officer is within twelve months of mandatory retirement
- An enlisted member is within 12 months of his or her retention control point (RCP) with retirement eligibility at RCP

The underlying theory is that Airmen are presumed fit because he or she has continued to perform military duty up to the point of retirement for reasons other than physical disability. Disability retired pay is to compensate only those whose career is terminated solely for reasons of disability.

Overcoming the presumption

Application of the Presumption of Fitness Rule does not mandate a finding of fit for duty, rather, it is a rebuttable presumption that can be overcome if the preponderance of evidence establishes the circumstances described below exist:

- Within the presumptive period an acute, grave illness or injury occurs that would prevent the member from performing further duty if he or she were not retiring
- Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the member were not retiring
- The condition for which the member is referred is a chronic condition, and a preponderance of evidence establishes that the member was not performing duties befitting his or her experience in the office, grade, rank, or rating before entering the presumptive period.

Physical Evaluation Board Liaison Officers (PEBLOs):

Airmen entered into the DES are assigned a PEBLO from their Medical Treatment Facility (MTF). The PEBLO counsels them on the MEB/PEB process, board findings, their related rights and benefits. PEBLOs are Surgeon General assets and are not under the control of the personnel division. They also are not paralegals or attorneys, but they are expected to fully counsel Airmen undergoing DES processing.[9] They are assigned from the point of referral into the DES through the time the individual is separated from service. Required PEBLO duties include:

- Explaining to the evaluee: the process of the DES and the VA Claims process (VA Physical Disability Evaluation Board Claim -VA Form 21-0819); the statutory, DoD requirements and respective Air Force policies including process steps on dispute resolution; the methodologies for decisions and the ramifications of board findings; the processing of requests for formal boards and appeals; the payment calculations for severance pay or retirement pay, or referral to the appropriate DFAS or finance representative for the information
- Assisting the evaluee to get in touch with legal counsel, the Military Service Coordinators (to explain the potential VA benefits and VA-specific appeal process),[10] and the Social Security Administration (for any benefits that the evaluee could receive while on active duty and after transition to veteran status)
- Counseling the evaluee on potential transition insurance and Survivor Benefit and Transition programs and benefits or referral to the appropriate base level support agencies to include trained Survivor Benefit Plan (SBP) counselors and the Transition Assistance Program (TAP) staff (This information is also provided by the Air Force's TAP)
- Providing the evaluee with a copy of their medical evaluation board results or the narrative summary, the Informal Physical Evaluation Board findings, rating(s) and decision, and line of duty determinations upon election of Formal Physical Evaluation Board and ensuring the evaluee's medical records are available for review

[9] *See* DoDI 1332.38, Encl. 6, *Assignment Guidelines, Training and Qualification, Duties, and Resources for Physical Evaluation Board Liaison Officers (PEBLOs) in the Disability Evaluation System (DES).*

[10] The MSC is a VA employee assigned as liaison for the evaluee to assist them in the VA claims process, case development, notifications of VA findings and ratings, and to ensure timely award of claims. DoDI 1332.38, para. E6.1.2, *Military Service Coordinator (MSC).*

Not Compensable Findings

In general, medical conditions considered by the DES are compensable when incurred in the line of duty or permanently aggravated by military service. Compensability can be affected by history of the condition having existed prior to service, misconduct, negligence and noncompliance with prescribed medical treatment. Compensation is also not available for conditions not constituting a physical disability.

Existing prior to service (EPTS) conditions are not compensable under the theory that the service did not give the person the condition and did not do anything to make it permanently worse. Under what is commonly referred to as the "eight-year-rule" any EPTS condition a person may have is 'bought' by the AF once the person has at least eight years of active duty service.[11] A basic principle of DES compensability is that a service member is presumed to have been in sound physical and mental condition upon entering active duty unless otherwise noted and recorded at the time of entrance. Even when a condition is established as EPTS, all EPTS conditions are presumed service aggravated. Both of these are rebuttable presumptions but recent changes increased the standard for overturning the presumptions to requiring a PEB to show by "clear and unmistakable evidence" that both the disability EPTS and was not aggravated by service.[12]

Misconduct that causes the injury being considered will usually make the condition not compensable. For such findings, a formal line of duty investigation is required showing the misconduct was intentional.[13]

Unauthorized absence or absence without leave (AWOL) situations during which an injury or disability is incurred will usually make the condition not compensable. In such cases, the record must contain enough evidence to support the finding the injury occurred during the absence.[14]

Noncompliance or willful negligence may be used for finding a condition not compensable. This requires someone to unreasonably refuse prescribed medical care or negligently fail to take care of themselves.

Conditions not constituting a physical disability make some medical conditions to be found to be not compensable. These include most conditions historically not considered to be disabilities, such as enuresis, sleepwalking, developmental and learning disorders, specific mental disorders such as personality, impulse control and adjustment disorders along with obesity, over height, and many allergies.

Compensable Findings

In cases where a PEB has determined the person's medical condition is unfitting and compensable, the Board must then assign a percentage rating for each unfitting and compensable condition. The rating amount is based on the VASRD which breaks body systems into four digit codes that identify the condition and which come with percentage amounts ranging from 0% to 100%. So, someone with a respiratory system condition such as asthma would be rated from 0% to 100% under VASRD Code 6602. When the PEB rates more than one condition they will combine the individual percentages using a combined ratings scheme often referred to as "fuzzy" or "medical math" which is a combining system that does not follow simple addition such as 30% plus 20% equals 50%. Instead, the system takes into consideration the efficiency of the individual as affected first by the most disabling condition in the order of severity. Thus, a person having a 30% disability is considered 70% efficient and the additional loss of 20% is subtracted from the 70% vice being added together as 30 +20 =50. Under medical math, the formula is 30 + 20 = 44 and since percentages can only come out in amounts of ten, the result is reduced to the closet tenth, resulting in a 40% rating. The easiest way to figure combinations of VASRD rating amounts is to use the VASRD's combined ratings table.[15]

Military use of the VASRD without deviation from the schedule, or any interpretation of the schedule, to determine compensable disability award amounts

[11] The eight-year-rule was created as a type of 'safe harbor' rule for military members. 10 USC §1207a.

[12] DoDI 1332.38, para. E3.P4.5.2, *Presumptions for Members on Ordered Active Duty of More Than 30 days*.

[13] DoDI 1332.38, paras. E7.1.5 and E3.P4.4, *Line of Duty Requirements*.

[14] DoDI 1332.38, paras. E7.1.5 and E3.P4.4, *Line of Duty Requirements*; AFI 36-3212, para. 3.21, *Absence Without Leave (AWOL)*.

[15] VASRD at §4.25, *Combined Ratings Table*.

is one of the most important changes made to the military DES by the NDAA 2008. Specifically, the military services were ordered, to the extent feasible, to apply VASRD rating criteria the same way the VA applies it.[16] This specifically included the requirement that the services take into account all medical conditions, whether individually or collectively, that render the member unfit for duty. The services were also instructed to stop using their own interpretations and told to rely on VA and United States Court of Appeals for Veterans Claims interpretations instead. Finally, the law allows the military to deviate from the rating criteria in the VASRD only if the use of such alternative criteria would result in an evaluee getting a higher percentage disability rating than would occur under the normal VA criteria.

Unfit compensable (separation pay) findings by a PEB results in separation with severance pay. This occurs when the VASRD rating is found to be less than 30% and the evaluee has less than 20 years of active federal service. If the person has 20 or more years and are otherwise entitled to a length of service retirement they cannot be rated less than the 20 years of earned retirement which is calculated as 2.5 x years of service. (So the typical 20 year retirement is worth 50%.)[17] If they do not have 20 years service and are rated at 0%, 10% or 20%, then their separation pay amount is calculated as 2 x monthly base pay amount x years of active service.[18]

NDAA 2008 made two important changes to how separation pay is treated. First, the old law provided no minimum years of service for calculating separation pay and you had to have 6 months and a day to get 1 years pay and you could only get a maximum of 12 years. This meant you could get just one year times your monthly pay and even if you had 19 years you would only get 12 years pay. Under the new law, the minimum number is 3 years (6 years for those injured in a declared combat zone or combat related injury) and the maximum is 19 years. Secondly, the old law required everyone receiving medical separation pay to have that amount deducted from any subsequent VA disability pay for the same condition, (commonly referred to as the "VA offset"), but the new law provides for no offset if their injuries were incurred in a combat zone or are combat related. The VA offset is misunderstood to mean all one's VA pay will stop till the separation pay is offset or repaid, but in actuality the offset is only for the percentage amount for identical conditions for which one gets VA pay. For example, if you got a $10,000 separation pay package and a 10% asthma rating and then got rated by the VA at 10% for asthma and 50% for sleep apnea and received $700 a month from the VA then you would lose about $120 from the $700 till you paid back the $10,000. Since you did not receive any separation money for the sleep apnea, you would not have any off set against that portion of your monthly VA pay. (Please note the amounts used in this example are illustrative only and **not** equal to actual VA rating amounts which depend on various factors.)

Unfit compensable (medical retirement) findings by a PEB will result in medical retirement. This occurs where the VASRD rating is found to be 30% or higher. Medical retirement entitles Airmen to all the benefits of a length of service retirement. Retirement pay is calculated by multiplying the combined rating by the person's monthly base pay. By law, no one retired under the DES can receive more than 75% of their monthly base pay. So even if you received a 100% rating, you would only get 75% of base pay. If an evaluee receives a 30% or higher rating and retirement, they may still want to appeal to the Formal PEB for a full hearing if they want to be found fit for duty, want a higher percentage rating, want a combat related finding, or desire placement on the TDRL.

Additional Considerations

Combat Related Issues: A determination of whether a case is combat-related must be made in all cases where compensation is granted, whether it is separation with severance pay or disability retirement. Tax exempt benefits accrue when a PEB determines a member's unfitting injury or injuries is/are combat related. Combat related means they were incurred

[16] NDAA 2008, §1642. "To the extent feasible" is explained in Encl. 7 of DoDI 1332.38, para. E7.1.3. "In applying the VASRD, any determination of infeasibility would have to be based on statutory differences between the DoD and VA disability systems, compelling differences in mission grounded in statute, or some other major difference in the 2 systems. A policy disagreement or different medical opinion would not constitute infeasibility."

[17] The actual amount of retirement can be affected by multiple factors, most often the application of high-three vice final pay vice redux compensation rules.

[18] 10 USC § 12312(b)(3). *See* U.S. Dep't of Def., Financial Management Reg. 7000.14-R, Vol.7A, Ch. 35, para. 350503.E (June 2010).

as a direct result of armed conflict,[19] or caused by an instrumentality of war.[20] Tax exempt benefits are also available if, on September 24, 1975, they were a member or obligated to become a member of an armed force or reserve component, including the National Oceanic and Atmospheric Administration or the U.S. Public Health Service.

Combat related claims will normally cause a PEB to look for some type of evidence corroborating combat exposure. Evidentiary requirements for these cases is changing because of special compensation programs[21] and due to the general acceptance that combat has changed in the 21st century with no well defined front lines or clear separation between combat and non-combat duties.

Temporary Disability Retirement List (TDRL): When a PEB determines an evaluee's condition(s) is/are unstable and their combined rating is 30% or higher or they have at least 20 years service they may be temporarily retired (placed on the TDRL). Members on TDRL receive all the benefits of length of service retirement, including retirement pay. Everyone placed on the TDRL receives a minimum pay rating of 50%, even if their assigned rating is less. If they have a higher rating, or have over 20 years active service, then they will receive that amount up to the 75% ceiling. Everyone placed on the TDRL should be advised to contact a VA or Veteran Service Organization (VSO) representative to file for potential VA benefits. Despite an aggressive information campaign, there continues to be an urban myth that since TDRL is "only" temporary retirement, those on it cannot file for VA and other benefits. This is wrong.

Those placed on the TDRL must undergo periodic evaluations of their condition(s) at least every 18 months.[22] If the periodic reevaluation exams find the condition(s) remain(s) unstable, the person can remain on the TDRL up to a maximum of 5 years, but there is no "right" to be kept on the TDRL for the full 5 years. At the time the case is finalized, either due to stability or end of the 5 year maximum, the determination can be fit for duty, fit for duty but is required to be discharged under a non-medical provision, medically discharged with separation pay, or permanent retirement.

Limited Duty Status (LAS): Some members found physically unfit by a PEB can continue to serve on active duty in LAS with limitations and controls over their assignments.[23] Members on extended active duty who have from 15 to 19 years and who have needed skills or experience, or who are in a needed grade or specialty may be considered for LAS. Their otherwise unfitting condition(s) must be essentially stabilized or gradually improving and they must be able to function in a normal military environment without adverse effect on their own or others health and not require an excessive amount of medical care. The LAS allows Airmen the opportunity to continue their military careers and/or possibly qualify for length of service retirement vice medical discharge or retirement, but the number of members retained in LAS is by policy to be held to an absolute minimum. It is at the AF Personnel Division's sole discretion to determine what skills are needed and entry into LAS confers no legal or vested right to remain in the AF. Finally, those in LAS are subject to reevaluation at any time and if they no longer meet AF needs, may be re-entered into the DES or retired if eligible.

Appealing PEB Decisions

While on Active Duty: Airmen who disagree with their Informal PEB decision have the option of appealing to the Formal PEB. Airmen who disagree with their Formal PEB decision have ten days after they receive the decision and have spoken with their representative to submit an appeal to the Secretary of the Air Force Personnel Council (SAFPC) who is responsible for the appellate review. The SAFPC can defer action awaiting more information, concur with the PEB decision, nonconcur and modify or reverse the PEB decision, or return the case for further findings. Neither the member, next of kin, nor counsel may appear before the board except at

[19] Armed conflict includes raids, skirmishes, rebellion, guerrilla action, riot or other actions where the service member is engaged with a hostile or belligerent force as well as situations involving resistance to a hostile force such as being a POW. DoDI 1332.38, para. E3.P5.1.2, *Armed Conflict*.

[20] These are vehicles, vessels or devices designed primarily for military use and used for military use at the time of injury. DoDI 1332.38, para. E2.1.17, *Instrumentality of War*.

[21] Combat Related Special Compensation (CRSC) under 10 U.S.C. §1413a is one such. Further information can be obtained at–www.afpc.randolph.af.mil/library/combat.asp (last visited Aug. 19, 2010).

[22] 10 U.S.C. § 1210(a). An exception was made for those suffering from Traumatic Stress who must have their TDRL exam scheduled within a timeframe that is not less than 09 days, but within the 6 month period following discharge. 10 U.S.C. §1216a and DoDI 1332.38, para. E7.2, *Mental Disorders Due to Traumatic Stress*.

[23] AFI 36-3212, Chapter 6, Limited Assignment Status (LAS).

the specific invitation of SAFPC. The board reviews all the records evaluated by the PEB(s), the record of the Formal PEB hearing, plus any rebuttal or additional evidence submitted by the member or requested by SAFPC.

After Separation or Retirement: After separation from military service, retired and former Airmen may appeal their cases to the Air Force Board for Correction of Military Records (AFBCMR), The Air Force Discharge Review Board (AFDRB),[24] the new DoD Physical Disability Review Board (PDRB)[25] or in federal court. AFBCMR claims are supposed to be filed within 3 years[26] of the first knowledge of a claimed error or injustice and after the former Airman has exhausted all administrative remedies offered by existing laws and regulations. AFDRB claims must be filed within 15 years. As a reflection of the interest being paid in post traumatic stress disorder (PTSD) and traumatic brain injury (TBI) cases, these cases are to be given priority over other cases and expedited processing. When a DRB considers such cases, it must include at least one member who is a physician, clinical psychologist, or psychiatrist. Based on its findings, the Board may recommend (subject to review by the service secretary concerned) a change in the discharge or dismissal or issue a new discharge. The new PDRB was established by Section 1643 of the NDAA 2008. Its purpose is to reassess the accuracy and fairness of the combined disability ratings assigned Service members who were discharged as unfit for service with a rating of 20 percent or less and were not found to be eligible for retirement.[27]

The Board consists of a three-member panel that reviews all applicable evidence regarding the prior rating determination and then makes recommendations to the appropriate service secretary. The reviews are paper only with no right to personal appearance. The Board evaluates cases upon request of Airmen, surviving spouse, next of kin, or legal representative or by its own motion. Only Airmen separated between September 11, 2001, and December 31, 2009, are eligible for Board review.

The Board can recommend no change to the prior determination, a change to retirement, a modification of the rating percentage (but not to a lower rating) or issue a new combined disability rating including changing a previous "fit" finding to "unfit" with an appropriate rating. The PDRB's recommendations to the services can be rejected or accepted and if accepted the service may modify the individual's records accordingly. Prior to Change 1 to the DoDI in 2009, the PDRB was allowed to conduct reviews using the VASRD and DoD rules and regulations in effect at the time the appellant was originally rated. This was changed because it meant the Board could use the since rescinded DoDI 1332.39 and service regulations.

The DoD is moving to a disability system more closely aligned with that of the VA.

Differences Between AF and VA Programs

As discussed in the next section, the DoD is moving to a disability system more closely aligned with that of the VA. It is helpful to note several differences between the DoD and the VA systems. These differences stem from the fact that the two systems are designed to accomplish different purposes. The DoD and AF disability evaluation systems are designed to ensure that the military maintains a fit and vital fighting force. The military uses the DES to remove active duty service members who can no longer perform their military duties because of a physical or mental defect.

The VA system, on the other hand, is primarily concerned with compensating members for the impact of adverse medical conditions that developed while the member was in the service. The VA system, therefore, makes its disability determinations based upon the effects that the member's condition will have upon the remainder of their personal and professional life. The VA is supposed to consider only how the medical condition impacts the member's

[24] *See* the Air Force Review Boards Offices website, http://www.afpc.randolph.af.mil/safmrb (last visited Aug. 19, 2010). *See also* DoDD 1332.41 and DoDI 1332.28.

[25] *See* DoDI 6040.44. Those who appeal to the PDRB must agree not to seek relief from any Service Board for Correction of Military Records and also agree that the PDRB's recommendations once accepted by a Military Department if final. *Id.*, at para. 5.c, *Secretaries of the Military Departments*.

[26] Failure to file within the mandated three years is seldom used to bar claims as the Board will consider reasonable excuses for delays.

[27] DoDI 6040.44, at para. 4, *Policy*.

future employability or earning capacity,[28] but there has been some debate over how the VA determines such impact and Congress has mandated changes to ratings which clearly cover not just employment but also loss to quality of life.[29]

Another difference is the term of the rating given by each system. The military's ratings take into account the member's condition at the time of the examination only and are permanent upon final disposition. That is, the AF takes a "snapshot" of how the person is doing at the time they are evaluated and bases their rating only on the member's fitness to perform his or her military duties at that point in time. VA ratings, however, consider the likely effects of the disability over time. Moreover, the VA rating may fluctuate over time, depending upon the progression of the condition and advances in technology that diminish the impact of the disability. Thus, VA review is more of a "moving picture" review that follows the veteran for the rest of their lives.[30]

Finally, due to these differences, it is possible a military member may receive a disability rating from the VA but not be deemed to be disabled and not receive a disability rating from the AF. This might happen, for example, if an AF member were to be diagnosed with tinnitus (ringing in the ears) while serving on active duty. Because the minor ringing in his ears likely would not affect his ability to perform his AF duties, the injury would not normally be cause for a disability evaluation and so not be compensable under the AF DES. The key difference is the AF must first find the condition to be unfitting for military service while the VA has no such prerequisite. Thus, the member on leaving active duty may well obtain a disability rating under the VA system as compensation for the fact that their hearing was 100% effective on entry to duty and is now only 90% effective.

It is possible a military member may receive a disability rating from the VA but not be deemed to be disabled and not receive a disability rating from the AF.

Joint DoD and VA DES Pilot Program

In November 2007, the DoD and VA implemented the test of a new type of joint disability evaluation system, named the DES Pilot Program. The program was designed to deliver faster, more consistent disability evaluations and compensation to wounded, ill and injured service members and veterans.[31] Originally, the project covered only disability cases originating in the three military treatment facilities in the National Capital Region, but it has since been expanded to 25 other facilities with the ultimate goal of having the program replace the present system. At present the two systems co-exist with some Airmen being processed under the new Pilot DES while others continue with what is generally referred to as the legacy DES.

Major features of the Pilot Program include use of a single comprehensive medical examination and a single-sourced disability rating. The VA would conduct the comprehensive exam using existing VA medical exam worksheets designed to capture all needed information for disability rating under the VASRD. The VA would then assign the VASRD rating percentage(s) and the military services would accept the rating for all medical conditions they find unfitting for service, except for any conditions arising from noncompliance, misconduct or that existed prior to service without aggravation. Certified disability counsel would continue to be available for evaluee to the extent each service provides such assistance.

[28] The VASRD rating percentages are supposed to "represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations." 38 C.F.R. 4.1 (2003).

[29] VASRD ratings have evolved to cover more than just basic eight hour work loss to cover the "spillover" effect of a disability. This effect is also referred to as "disability time" to reflect the added time a disability adds to doing various levels of activities of daily living or work. As one study noted, "[d]isabled individuals may have more frequent or extended unpaid absences from work for health reasons. If so, these abscenses would reduce earnings and be reflected in the ratings schedule."Richard Buddin and Kanika Kapur, RAND National Defense Research Inst, An Analysis of Military Disability Compensation xvi (2005).

[30] The VA considers a veteran's claim periodically over time to see if they are still as disabled as they were when the rating was first granted, and the rating may also be changed to take into account changes in medical and physical rehabilitative sciences. "Over a period of many years, a veteran's disability claim may require rerating in accordance with changes in laws, medical knowledge and his or her physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history." VASRD, § 4.1

[31] DTM, 21 Nov 2007.

The Pilot Program process starts the same as the present DES process with individuals suspected of having unfitting medical conditions entered into the DES for a MEB processing. The VA comprehensive medical exam will be done and an AF medical provider will then review the exam and the evaluee's service medical records to determine if the person has any potentially unfitting conditions. A MEB report will then be written, basically the same as the presently used NARSUM. If it is determined that any of the conditions appear to be unfitting for further service, the evaluee's case will be sent to a PEB for review. The PEB will determine if the person is fit or unfit as they do now. The information used in the initial informal document only review also remains the same, to include the MEB NARSUM, the VA's exam, the commander's fitness/utilization/performance statement, and applicable personnel documents. The PEB acts as they presently do and decides if any conditions are unfitting and compensable and related issues such as existence of combat relation. The findings are provided to the Airman who can agree with the Board's decision or appeal to the Formal PEB where they can have a full review, with a hearing with all the legal rights that they have under the present system.

One difference in the Pilot cases is that Airmen can agree with the informal PEB's fitness determination but disagree with the VA determined disability rating. They can also agree with the VA rating and request a formal hearing to contest the PEB's fitness determination. Every evaluee found unfit will have a one-time opportunity to appeal their VA rating which is important as each service will have to accept the VA's rating in determining final disposition such as severance pay vice retirement. The one-time only reconsideration must be done prior to the evaluee's separation from active duty.

Any appeals of the VA rating made after separation will not be accepted for military disposition unless the VA appeal (initiated by a "notice of disagreement") was filed within one year of separation. Additionally, if the post-separation appeal is successful and the rating is changed by the VA, the now post-active duty Veteran must file a claim to request a change of their military disposition through the AFBCMR.

AF disability counsel can assist an evaluee with any reconsideration of their initial VA ratings prior to their separation from active duty, but help with later reconsideration appeals that occur after separation is not available as the individual would no longer be active duty. Help is available, however, by a multitude of VSOs. The initial VA rating appeal is a document only review by a VA Decision Review Officer and the appellant may provide written argument and evidence but is not allowed a personal appearance. The standard used in all VA rating appeals is new medical evidence or evidence of error sufficient to warrant a review.

Conclusion

Everyone under consideration for a disability evaluation is best served by obtaining information and advice from certified disability legal counsel as soon in the process as possible. While no attorney-client relationship can be entered into until an individual has actually had an MEB decision that raises the possibility of loss of benefits, disability paralegals and attorneys can provide general information on the DES at any time. Early contact can help individuals understand the process they are facing and hopefully help them make initial decisions that can help them obtain the best results should they get a negative MEB result.

Once a person has received a negative MEB result, they should seriously consider contacting the disability legal office to discuss their options. It is important to note that certified AF disability defense counsel represent the evaluee and are dedicated to zealous advocacy for their clients. They do not advise or represent the MEBs/PEBs or the heads of the AF DES.[32] It is the mission of the AF PEB Defense Counsel Office to provide services to the greatest extent possible from receipt of a negative MEB to preparation of appeals to the SAFPC. Many factors impact an Airmen's disposition in the AF DES and there are specific evidence-driven strategies that can make all the difference in either getting returned to duty or getting the best possible benefit package.

[32] Those entities have their own independent legal counsel at the AFPC level from the HQ AFPC Office of the Staff Judge Advocate and on the Personnel Council where judge advocates serve as the boards' legal advisors.

THE LONGEST WAR:

THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA

by Peter L. Bergen (Simon & Shuster, 2011)

Reviewed by Major Ryan D. Oakley, USAF

Mulling over the many books covering multiple viewpoints since the September 11th attacks, one might question what one more volume adds to our understanding. But make no mistake: with its ambitious scope, taut narrative, and hard-hitting analysis, *The Longest War* is worthy of your time, whether it is the first book you read on this topic, or merely the latest on top of the stack.

Reflecting on a living history that is being rewritten and reinterpreted daily, Peter Bergen's comprehensive yet succinct account is concerned with addressing issues, ideas, strategies, and decisions, not just events. His grand goal is to tie together the inflection points that fueled al-Qaeda's rise, resulting in the deadliest terrorist attack on America soil, and propelling the U.S. to war in Afghanistan and (controversially) Iraq. *The Longest War* seeks to understand the consequences of these actions, the lessons learned, and the questions that still remain. A globe-trotting reporter, Bergen doesn't shy away from giving his opinions, leveling blistering criticism and assigning blame where he finds it. Yet the author has no ideological or partisan axe to grind, as evidenced by his clear, even-handed analysis. Even if you disagree with his final conclusions, you can follow the path towards your own. This is the type of book that makes you think.

Bergen also brings to the table what many of his Western contemporaries, however well-traveled, have lacked: a rare, up-close understanding of al-Qaeda, its allies, and its (now dead) founder, Osama bin Laden. In 1997, Bergen traveled under cover of blindfold and AK-47s though Taliban-occupied Afghanistan to produce bin Laden's first televised interview on CNN. This allows the author, without assigning moral equivalence, to explain what al-Qaeda's goals and motivations truly are. He also paints a vivid portrait of how bin Laden's twisted worldview was formed, which is pared down from his two previous books, *The Osama bin Laden I Know*, and *Holy War, Inc*. Despite popular rhetoric, bin Laden declared war on the United States, not because he hated our freedoms, but because he wanted Western governments to retreat from Middle Eastern lands and spheres of influence. Based on his experience fighting the Soviets in 1980s Afghanistan, bin Laden believed that by bringing down his "far enemy" first (the U.S.), his "near enemy" (Western-backed governments like Saudi Arabia and Egypt), would fall like a house of cards, ready to be replaced by Taliban-style theocracies. But the U.S. did not fold like a paper tiger. By the end of 2001, al-Qaeda's central leadership was decimated, demoralized, and on the run. Moreover, bin Laden's brutal, austere fanaticism proved to be deeply unpopular in the Muslim world, not to mention among his immediate family.

By any measurable account, al-Qaeda failed to achieve its strategic objectives and has often proven to be its own worst enemy. Yet, Bergen writes, "the West has snatched defeat from the jaws of victory a number of times already." For example, fearful of a looming second wave of attacks, policymakers approved the use of (ineffective) coercive interrogation techniques, rather than relying on tried and true conventional methods recommended by experienced interrogators. These and other unforced errors deviated from traditional American values and legal norms, unilaterally forfeiting our "moral high ground." There were costly mistakes on the battlefield as well. In both Afghanistan and Iraq, the author asserts there were too few troops to secure the peace after initial near-crushing victories over the enemy.

Narrowly escaping from caves of Tora Bora, al-Qaeda and the Taliban would regroup in the uncontrolled tribal areas of Pakistan. There, deadly plots against targets in London, Bali, Mumbai, and elsewhere would be hatched, a number involving "homegrown" terrorists born in Western countries. Moreover, in Bergen's opinion, the decision to preemptively topple Saddam Hussein's regime, which was not involved in the 9/11 attacks, "breathed new life into bin Laden's holy war." Asserting a case for "defensive jihad," a moribund al-Qaeda was able to plant, seed, and harvest a fresh crop of violent jihadists who traveled to Iraq and Pakistan to train and fight. In particular, al-Qaeda and its allies in Iraq proved especially adept in information operations and using the Internet to recruit suicide bombers. "If Vietnam had been the first television war, and the 1991 war to liberate Kuwait from Saddam Hussein's armies had been the first cable news war, Iraq was the first web war," Bergen notes.

The stunning victory over Sadaam Hussein's forces in Iraq was quickly undermined by a series of closely-held and seemingly impetuous decisions to disband the Iraqi army and "de-Baathify" the civilian workforce. These disastrous missteps rapidly fueled a bloody insurgency now armed with unsecured weapons caches and augmented with foreign fighters, pushing Iraq to the brink of all-out civil war. Ironically, the author notes, al-Qaeda would gain a temporary foothold in an unstable Iraq, *post-invasion*. Insurgents gained control of vast swathes of territory while deadly IED-planting techniques to use against American troops and export back to Afghanistan. Yet once again, al-Qaeda would overreach with brutal tactics, repulsing the local population and leading to the Sunni Awakening. Seizing this opportunity, U.S. military leaders changed course and implemented a bold counterinsurgency strategy supported with a troop-surge to bring Iraq back from the brink.

Meanwhile, a determined resistance to "nation-building," combined with military resources being overwhelmingly diverted to fight in Iraq, allowed the Taliban to return to Afghanistan. Further complicating matters, Bergen outlines our fractious partnership with Pakistan, and its equally complicated ties with the Taliban, which it stem from the long-standing dispute with India over the Kashmir region. As the author drolly notes, "It was difficult for the United States to have an effective strategy for Pakistan if *Pakistan* didn't have an effective strategy for Pakistan."

Due to the book's early-2011 publication date, one major event not addressed is the recent Navy seal raid in Abbottabad, Pakistan which killed Osama bin Laden. But in a recent interview, the author called bin Laden's death "the final nail in the coffin" for al-Qaeda. To back up his assertion, Bergen cited polling data showing that "support for [al-Qaeda], bin Laden and suicide bombing has been dropping like a stone for years now," in the Muslim world. "The Arab Spring just underlines the fact that they were losing the war of ideas," Bergen reflects[1] Does bin Laden's death provide an opportunity for the U.S. to declare "victory" in the war on terror and ratchet down its overseas operations? Bergen believes so: "There will never be a Treaty of Versailles with [al-Qaeda] and, in the absence of that, these two events suggest that it is time to move on. The world and the United States have other issues to contend with," the author argues. While al-Qaeda remains dangerous like "a snake backed in the corner," it is now contained, and has miserably failed to achieve bin Laden's dark dreams.

How the next decade unfolds and what threat al Qaeda poses, will be widely debated. But what lessons learned do we take away at this vantage point? If you've read related books or followed these events closely, you may find portions of Bergen's book to be repetitive or "old news." But as a collective work, *The Longest War* forces us to reconsider how we think in the lengthiest ongoing military campaign in American history. As General David Petraeus wrote in his 1987 dissertation, military leaders inhibit success when "[w]e do not take the time to understand the nature of the society in which we are fighting, the government we are supporting, or the enemy we are fighting." It is worth remembering how shockingly little we once knew or paid attention about al-Qaeda before 9/11—even though war was declared on America while we slept. *The Longest War* goes a long way in providing its part of a painful and deferred understanding.

[1] Interview with Gregor Peter Schmitz, Spiegel Online, May 6, 2011 http://www.spiegel.de/international/0,1518,761082,00.htm

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Heritage to Horizons

Unveiling The Jones Building

The William A. Jones Building was officially dedicated on 22 March 2011 on Joint Base Andrews. The state of the art facility will eventually host over 2,300 military and civilian personnel from around the National Capital Region, including more than 20 General Officers and SES personnel. The building is five stories high and contains over 380,000 square feet of space. AFLOA is the largest single tenant in the building occupying the entire first floor and space on two other floors of the building. The building will eventually contain more than 340 JAG Corps personnel.

The building is named for Colonel William A. Jones III, a Medal of Honor recipient. Then Lt Col Jones was an A-1E Skyraider pilot who risked his life to save a downed F-4 Phantom pilot about 20 miles northwest of Dong Hoi in Vietnam. Lt Col Jones, after spotting the downed pilot, led a flight of rescue aircraft to the pilot. Lt Col Jones was severely injured during the rescue mission as his aircraft was the target of cannon and rocket fire. Lt Col Jones was badly burned but managed to return to his base to provide the needed information for the rescue before receiving medical care himself.

The Jones building is also home to the new Air Force Court of Criminal Appeals court room that the Air Force dedicated on 28 June 2011. The Air Force Judge Advocate General, Lieutenant General Richard C. Harding, presented remarks and thanks to many people who made the transition of the court from Joint Base Anacostia-Bolling to Joint Base Andrews possible. The design and the aesthetics of the new courtroom reflect its standing as the highest Air Force court just two steps below the Supreme Court of the United States.

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Captain Ryan Weld talks with villagers during a wroowali, or brotherhood, mission to Bakorzai village, Afghanistan. U.S. Air Force photo by Staff Sergeant Brian Ferguson